71-1072
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1072

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC.,

Petitioner.

vs.

GEORGE E. MAHIN, SUCCESSOR DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ET AL.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

(With Appendix)

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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GEORGE E. MAHIN, SUCCESSOR DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ET AL.,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioner, Glenn R. Heyman, Trustee in Bankruptcy of F. W. Koenecke & Sons, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois affirming judgment of the Circuit Court of Cook County, Illinois in this case which is reported at 49 Ill. 2d 284; 275 N. E. 2d 421, rehearing denied November 24, 1971.

JURISDICTIONAL STATEMENT

Petitioner seeks review of judgment by the Supreme Court of Illinois rendered September 30, 1971, rehearing denied November 24, 1971, affirming on rehearing the judg-

ment of the Circuit Court of Cook County, Illinois dated June 12, 1969. The judgment raises significant questions with respect to the repugnance of an Illinois Statute to the United States Constitution which were raised in the Circuit Court of Cook County and on appeal in the Supreme Court of Illinois. Therefore, this Court has jurisdiction to review under 28 U. S. C. §§ 1257(3), 2101(e).

QUESTIONS PRESENTED

1. Whether a regressive graduated discount system of compensating cigarette distributors for affixing tax stamps under a state tax act, the effect of which is to discriminate against high volume distributors to the extent that the discriminatory aspect alone makes it impossible for a high volume distributor to compete in business against sellers of lesser volume, and which destroyed petitioner's 87-year old business in six months after enforcement of the statute, is constitutional under the Fourteenth Amendment of the United States Constitution.

2. Whether the Supreme Court of Illinois may deny federal constitutional rights by characterizing for the first time on rehearing and on its own motion, factual allegations, as "conclusions" of the pleader.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved are the following provisions of the United States Constitution:

Section 1 of the XIV Amendment to the United States Constitution.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

Definitions of distributor the Cigarette Tax Act Ill. Rev. Stat. 1967, Ch. 120 § 453.1.

" 'Distributor' means any and each of the following:

(1) Any person engaged in the business of selling cigarettes in this State who brings or causes to be brought into this State from without this State any original packages of cigarettes, on which original package there is no authorized evidence underneath a sealed transparent wrapper showing that the tax liability imposed by this Act has been paid or assumed by the out-of-State seller of such cigarettes, for sale or other disposition in the course of such business.

(2) Any person who makes, manufactures or fabricates cigarettes in this State for sale in this State.

(3) Any person who makes, manufactures or fabricates cigarettes outside this State, which cigarettes are placed in

original packages contained in sealed transparent wrappers, for delivery or shipment into this State, and who elects to qualify and is accepted by the Department as a distributor under Section 4b of this Act."

Tax Rate and Discount Provision, Ill. Rev. Stat. 1967, Ch. 120, § 453.2:

"**Tax imposed — Rate — Collection and payment — Discount.]** § 2. (a) A tax is hereby imposed upon any person engaged in business as a retailer of cigarettes in this State at the rate of 4 mills per cigarette sold, or otherwise disposed of in the course of such business in this State. In addition to any other tax imposed by this Act, a tax is hereby imposed upon any person engaged in business as a retailer of cigarettes in this State at the rate of one-half mill per cigarette sold or otherwise disposed of in the course of such business in this State on and after January 1, 1947, and prior to the time that the Service Recognition Bond, Interest and Retirement Fund created by the Sixty-fourth General Assembly contains sufficient money to retire all bonds payable from that fund. The payment of such taxes shall be evidenced by a stamp affixed to each original package of cigarettes, or an authorized substitute for such stamp imprinted on each original package of such cigarettes underneath the sealed transparent outside wrapper of such original package, as hereinafter provided. However, such taxes are not imposed upon any activity in such business in interstate commerce or otherwise, which activity may not under the Constitution and Statutes of the United States be made the subject of taxation by this State.

When any tax imposed herein terminates or has terminated, distributors who have bought stamps while such tax was in effect and who therefore paid such tax, but who can show, to the Department's satisfaction, that they sold the cigarettes to which they affixed such stamps after such

tax had terminated and did not recover the tax or its equivalent from purchasers, shall be allowed by the Department to take credit for such absorbed tax against subsequent tax stamp purchases from the Department by such distributor.

The impact of the tax levied by this Act is hereby declared to be imposed upon the retailer and shall be prepaid or pre-collected by the distributor for the purpose of convenience and facility only, and the amount of the tax shall be added to the price of the cigarettes sold by such distributor. Collection of the tax shall be evidenced by a stamp or stamps affixed to each original package of cigarettes, as hereinafter provided.

It shall be the duty of each distributor to collect the tax from the retailer, at or before the time of the sale, to affix the stamps as hereinafter required, and to remit the tax collected from retailers to the Department, as hereinafter provided. Any distributor who shall fail to properly collect and pay the tax imposed by this Act shall be liable for the tax.

The amount of the Cigarette Tax imposed by this Act shall be separately stated, apart from the price of the goods, by both distributors and retailers, in all advertisements, bills and sales invoices.

Every retailer having cigarettes in his possession for sale on August 1, 1967, shall be required to inventory and pay this additional tax of 1967 in a manner prescribed by the Director of Revenue.

(b) *The distributor shall be required to collect the taxes provided under paragraph (a) hereof, and, to cover the costs of such collection, shall be allowed a discount* during any year commencing July 1st and ending the following June 30th in accordance with the schedule set out hereinbelow, which discount shall be allowed at the time

of purchase of the stamps when purchase is required by this Act, or at the time when the tax is remitted to the Department without the purchase of stamps from the Department when that method of paying the tax is required or authorized by this Act. *A discount equal to 2 2/9% of the amount of the tax up to and including the first $700,000.00 paid hereunder by such distributor to the Department during any such year, 1 7/9% of the next $700,000.00 of tax or any part thereof, paid hereunder by such distributor to the Department during any such year; 1 1/3% of the next $700,000.00 of tax, or any part thereof, paid hereunder by such distributor to the Department during any such year; and 8/9 of 1% of the amount of any additional tax paid hereunder by such distributor to the Department during any such year.*" (Emphasis added.)

Section 2(b) of the 1968 Act is identical in material respects with Section 2(b), as amended in 1967, as above set forth.*

STATEMENT OF CASE

The State of Illinois has imposed a cigarette tax since 1941. Ill. Rev. Stat. 1967 and 1968, Ch. 120, §§ 453.1-453.29. Payment of the tax is evidenced by a tax stamp. Since 1941 the statute has imposed upon wholesale distributors the duty of affixing a tax stamp to each package of cigarettes sold in Illinois, and has allowed the distributor a discount on the purchase of tax stamps as compensation for affixing them to packages (*Id.* § 453.2).

From 1941 to 1963 the discount to wholesalers remained five percent regardless of the volume of a distributor's

* In 1967 Section 2(b) was amended by two Acts of the legislature, one of which continued the discounts established by the 1965 amendment and the other which established the discount rates set forth above. (See Ill. Rev. Stats. 1967, Ch. 120, § 453.2, 1967.) The 1968 Act continued the rates set by the 1967 amendment quoted above. The amended complaint alleges the discounts allowed in 1968 were those specified in the 1967 amendatory Act.

annual tax stamp purchases. (Ill. Rev. Stat. 1941, Ch. 120, § 453.2(b).) Effective in 1963 the statute was amended to provide four regressive graduated discount brackets, granting decreasing discounts for each $700,000 increment of tax stamps purchased in a year. (Ill. Rev. Stat., 1963, Ch. 120, § 453.2(b).)

Since 1941 the cigarette tax per package has increased from time to time. Since 1963 the rate of discount allowed to wholesalers has decreased from time to time, but the graduated discount brackets have remained at $700,000 increments and the discount rate differentials between brackets have remained proportionate.* (Ill. Rev. Stats. 1963, , 1968, Ch. 120 § 453.2(b).)

It is the graduated discount feature which the petitioner has attached here as violative of the equal protection and other provisions of the Fourteenth Amendment of the United States Constitution.

From the time of its enactment in 1963 to the summer of 1968 the graduated feature of the discount system was not enforced. Under an interpretation of an opinion by the Illinois Attorney General, the Illinois Department of Revenue permitted a practice of employing multiple licensees to purchase tax stamps. Under this practice, when one licensee had purchased $700,000 face value of stamps and was therefore faced with graduating to a lower discount bracket, the business was continued, but in the name of a different corporate or individual licensee. The effect was that from 1963 to 1968 all distributors operated in the same (the highest) discount bracket.

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*Discount brackets in 1968 and 1969 (Ill. Rev. Stat., 1967 and 1968, Ch. 120, § 453.2(b)):

Stamp Purchases	Discount
$ 0 — $ 700,000	2 2/9%
$ 700,000 — $1,400,000	1 7/9%
$1,400,000 — $2,100,000	1 1/3%
Over $2,100,000	8/9 of 1%

In the summer of 1968 the Illinois Department of Revenue discontinued its practice of allowing multiple licensees.

F. W. Koenecke & Sons, Inc. ("Koenecke") was the successor to a family business which had been in the cigarette distribution business for over eighty years. In 1968 it was by far the largest single distributor of cigarettes in the midwest. It purchased over $40,000,000 of Illinois cigarette tax stamps annually which, at 9¢ per package, provided stamps for more than 440,000,000 packages of cigarettes.

When the discount provisions of the statute were enforced in accordance with their terms in the summer of 1968, Koenecke, because of its large volume of purchases, was within one month plunged into the lowest discount bracket. Compared with a group of smaller cigarette distributors doing an equivalent volume, but each operating in the highest discount bracket, Koenecke was placed at a competitive disadvantage of in excess of $650,000 per year.

Koenecke filed this suit in the Circuit Court of Cook County, Illinois, on August 29, 1968. The original complaint was dismissed upon the motion of the defendants and an amended complaint was filed on November 26, 1968, alleging the facts summarized above, and specifically alleging that the costs of collecting the cigarette tax do not decrease with increased collections of said tax (Amended Complaint, ¶ 14, Appendix at A7). The amended complaint correctly predicted the destruction of Koenecke's business as a result of enforcement of the graduated discount provisions.

The petitioner also specifically alleged in the amended complaint, at Paragraph 20, that the regressive graduated discount system was invalid and unconstitutional as being in violation or contravention of the United States Constitution for the reason that it deprived it of its property without due process of law in violation of the Fourteenth

Amendment and deprived the petitioner of equal protection of the law guaranteed by the Fourteenth Amendment. These federal questions were pressed in the proceedings in the Circuit Court of Cook County, Illinois (Appendix at A20), and ultimately before the Supreme Court of the State of Illinois (Appendix at A26, A45).

Following filing of the amended complaint, an order was entered directing defendants to segregate and hold aside from the general fund of the State of Illinois the difference (paid under protest by Koenecke) between the amount paid by Koenecke for stamps at the lowest discount rate and the amount which would have been charged in the highest discount bracket. However, Koenecke was required to continue to purchase the stamps at the lowest discount rate.

A motion to dismiss the amended complaint was filed on behalf of the defendants, but before it was heard in the Circuit Court, Koenecke was adjudicated a bankrupt upon an involuntary petition filed against it on March 13, 1969.

The cigarette industry is extremely competitive and the margins of profit to distributors small. Thus, an 87-year old business which was the largest in its industry in the middle west was destroyed in a scant six months after the discriminatory regressive discount system was first enforced as written.

The petitioner succeeded to Koenecke's position as its trustee in bankruptcy. The motion to strike the amended complaint for failure to state a cause of action was heard and granted by the Circuit Court of Cook County (Appendix at A15, A20, A21). Petitioner appealed directly to the Supreme Court of Illinois on the state and federal constitutional issues.

On December 4, 1970, the Supreme Court of Illinois reversed the judgment of the Circuit Court of Cook County and ordered the case remanded. In that opinion (Appendix at A22-A29), Mr. Justice Crebs of the Illinois Supreme

Court held that the graduated discount provision was in effect a tax upon the distributor and noted that the Illinois and federal Constitutions only protect a taxpayer from invidious discrimination and that a tax which bears more heavily on one taxpayer than another does not of itself violate the uniformity provision of the Illinois Constitution or the equal protection clause of the federal constitution. But the Court held that if the allegations of the amended complaint were true, the regressive discount system would violate petitioner's constitutional rights as expressed by this Court in *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550, 556, 79 L. Ed. 1054, in that it "exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act more oftener than the other." (Appendix at A26-A27). The Illinois Court acknowledged that the legislature has broad powers to enact tax laws which affect some persons differently than others so long as there is a reasonable state of facts to justify the discrimination. The Court ruled, however, that the facts alleged in the amended complaint conflict with the legislative determination to such an extent that the graduated discount would be invalid, and that the petitioner is entitled to an opportunity to prove those allegations.*

The defendants filed a petition for rehearing (Appendix at A30-A35) which was granted, and on September 30, 1971, Mr. Justice Ryan rendered an opinion of the Supreme Court in which the judgment of the Circuit Court of Cook County was affirmed. There are no facts intervening between the two diametrically opposite opinions except changes in the personnel of the Illinois Supreme Court.

* To emphasize the inconsistency of the legislative graduations, Justice Crebs points out that each time the cigarette tax is increased, the large producer is more rapidly put at a competitive disadvantage, since the graduations are based upon the dollar volume of stamps purchased and not upon the number of stamps affixed (Appendix at A27).

Mr. Justice Ryan's opinion, which reversed the Court's prior holding and found that the Illinois cigarette tax was not a tax upon the wholesaler, is based upon two grounds:

(1) The graduated discount provisions of the Cigarette Tax Act do not violate Section 1 of Article IX of the Illinois Constitution of 1870 (Revenue) because a 1963 amendment to the Act declared that the impact of the tax was on the retailer; hence, petitioner has not been a "taxpayer" since that time; and

(2) Viewing the graduated discounts as compensation statutes, they are not invalid because petitioner has supposedly alleged only that "Said costs do not decrease with increased collections of said tax." This allegation is first criticized as possibly referring only to petitioner's costs and in failing to tell the Court whether petitioner ran its business with reasonable efficiency, when compared with others in its calling. Alternatively, the Court holds that, if it be assumed that the allegation is that the costs generally, instead of petitioner's costs, do not decrease with increased collection of taxes, this is only a *conclusion* of the pleader, which is not admitted by the motion to dismiss the amended complaint (Appendix at A44, A45).

The Court finds that "the admitted allegations do not indicate that the classifications are arbitrary or capricious in violation of the equal protection clause of the fourteenth amendment of the Federal constitution" (Appendix at A45).

Each of the above grounds is further discussed below.

The petitioner filed a petition for rehearing after the September 30 opinion, which petition was denied on November 24, 1971. Petitioner now files its petition for writ of certiorari.

ARGUMENT

A writ of certiorari should be granted because the Illinois Supreme Court has decided an important federal question of substance not heretofore determined by this Court and has also decided it in a way probably not in accord with applicable decisions of this Court. In brief, certiorari should be granted for both reasons stated in Rule 19(1)(a) of this Court.

In its original opinion herein, the Supreme Court of Illinois held that if petitioner proved the allegations of its amended complaint, the regressive graduated discount provision of the Illinois cigarette tax statute would be invalid under this Court's decision in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 556, 79 L. Ed. 1054.

On rehearing, the Illinois Court held on its own motion that the cigarette tax was not on petitioner but upon the retailer, and that petitioner, as a mere collector of the tax, was not entitled to relief under the uniformity clause of the Illinois Constitution relating to revenue. (Art. IX, Sec. 1, 1870 Constitution of Illinois.)

Having thus disposed of the state constitutional law point, the Court held that what was involved was a system of compensation and that the allegations in the amended complaint were not sufficient to demonstrate invalidity of the compensation provision under the equal protection clause of the federal Constitution because the claim of discrimination was predicated upon an allegation that costs do not decrease with increased collection of the tax as provided in the statute. The Illinois Supreme Court, contrary to its first opinion, held that this allegation was a "conclusion" which was not admitted by the motion to dismiss, upon the granting of which the case came originally to it.

The Illinois Supreme Court by reinterpreting the Cigarette Tax Act between the first and the second opinions as not laying a tax upon distributors, but upon retailers, and by converting an allegation of fact into a "conclusion", succeeded, in its view, in sustaining the Act against federal constitutional challenge.

We submit that certiorari should be granted primarily for three reasons:

(1) The constitutionality of a state statute under the federal Constitution is not governed by whether it is called a "tax" or a system of compensation. The economic impact upon the person bearing the burden of the discriminatory provision is controlling, not the label attached to it.

(2) Federal constitutional rights may not be defeated by characterizing an admitted allegation as a "conclusion", it having been treated as a fact by the parties and by the Illinois Court through its first opinion. By its interposition of this point in its final opinion on rehearing, the Illinois Supreme Court denied petitioner the opportunity it would have had under the state practice act, to amend any pleading found deficient. State procedure cannot be a barrier to thwart a person enforcing its constitutional rights, especially when interposed for the first time in and by the state court of last resort.

(3) The equal protection clause has received increasing attention by this Court in other fields and it and the other federal courts have readily struck down state legislation far less invidious in its discriminatory effect than the Illinois act under consideration.

The unique legal and factual situation which presents itself in this case centers around the "discounts" given to licensed distributors under the Illinois Cigarette Tax Act (Ill. Rev. Stat. 1967, Ch. 120, § 453.2(b)). Distributors are required by law to collect the tax and affix the tax stamps to all packages of cigarettes sold in Illinois (*Id.*). A distrib-

utor is required by law to make monthly payments toward the collection of tax and is liable if the tax is not paid. However, "[t]he impact of the tax levied by this Act is hereby declared to be imposed upon the retailer and shall be prepaid or pre-collected by the distributor for the purpose of convenience and facility only. . . ."* (*Id.*) This is ostensibly accomplished by having the distributor add the per-package tax to his price and pass it on to the cigarette retailer who passes it on to the consumer.

The effect is that a distributor doing a high volume of business such as petitioner, because it is in the lowest discount bracket, ultimately bears the economic burden of a higher per package tax than smaller volume operators in the highest discount bracket.** The difference in petitioner's case in 1968 and 1969 was in excess of $650,000 per year. As an economic fact, petitioner could not pass this on to its customers who could as readily purchase cigarettes from any number of distributors operating in high discount brackets.

In its first opinion the Illinois Court accepted that the discounts should be treated as tax. On rehearing the Court found as a matter of law that the discount was not a tax but "in the nature of compensation to the distributor to cover the cost of collecting the tax from the retailer."

The Court went on in its second opinion to hold that "the legislature is not required to grant any compensation for collecting the taxes." With this there is no disagreement.

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* Mr. Justice Crebs in the first opinion of the Illinois Supreme Court noted that, "This amendment changing the incidence of the tax was apparently passed to give the consumer a deduction on his Federal income tax return" (Appendix at A24).

** Cigarette taxes paid by petitioner represented approximately 1/3 of the state's revenue from cigarette taxes in 1968 (Appendix A9). No other taxpayer operated in the two lowest discount brackets.

However, when the legislature does decide to create a system of discounts, be it called a tax or compensation, it cannot constitutionally under the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution create a system so discriminatory and invidious as to force petitioner into bankruptcy while permitting its many low volume competitors to prosper.

Irrespective of what the discount system is called, it is the substance with which the Court is concerned and not the form. *American Oil Co. v. Neill*, 380 U. S. 451, 455 (1965); *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 401 (1928); *Lawrence v. State Tax Commission of Mississippi*, 286 U. S. 276, 280 (1932); *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71, 82 (1924); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 443 (1940). As said in the *Penney* case:

> "But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' *Henderson v. Mayor of New York*, 92 U. S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that 'in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence v. State Tax Commission*, 286 U. S. 276, 280."

There is no law under the Fourteenth Amendment which directly deals with discounts of the kind under consideration. Nevertheless this Court has provided a standard in *Danbridge v. Williams*, 397 U. S. 471, 485 (1970) where the court indicated that the standard for finding economic discrimination and social welfare discrimination is the

same. Therefore, it is submitted that the arbitrary discrimination of the case at hand is analogous to that in the cases of *Graham v. Richardson*, 403 U. S. 365 (1971); *Shapiro v. Thompson*, 394 U. S. 618 (1969), *Takahashi v. Fish & Game Commission*, 334 U. S. 410 (1948), where this Court found the respective statutes unconstitutional in violation of the Fourteenth Amendment.

If the regressive graduated discount system is a tax or analogous thereto, this Court has held that a tax with arbitrary and discriminatory classes based on volume are unconstitutional as violative of the Fourteenth Amendment. *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550 (1935); *Valentine v. Great Atlantic & Pacific Tea Co.*, 299 U. S. 32 (1936).

It is patently unjust for petitioner to have its amended complaint dismissed on a pleading question, raised for the first time by the Illinois Supreme Court *sua sponte* on rehearing before it, and contrary to its own state procedural law*, and thereby deprive petitioner of its federal constitutional rights.

It is further submitted that the Illinois Supreme Court had no right on the record before it to disregard petitioner's allegation forming the basis of the discrimination charge, namely that "costs do not decrease with increased collections" and then in effect make a factual determination to the contrary. This determination is a most flagrant denial of petitioner's federal constitutional rights in view of the present undeniable fact, prophesied in the amended complaint, that the original corporate plaintiff is now in bankruptcy.

*Under Illinois law the Supreme Court is limited, in reviewing a decision on a pleading motion, to the objections raised below. In this case the Court for unexplained reasons raised its own objection. This point was argued upon petitioner's Petition for Rehearing denied by the Illinois Supreme Court on Nov. 24, 1971.

Whether petitioner sufficiently pleaded a federal claim is a question for this Court.

> "It is settled that '[w]hether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of Federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.'" First National Bank v. Anderson, 269 U. S. 341, 346; Staub v. City of Baxley, 355 U. S. 313, 318.

Allied Stores v. *Bowers*, 358 U. S. 522, 525 (1958).

State procedure cannot be used as a barrier to thwart a persons enforcement of its constitutional rights. *Baker* v. *Carr*, 369 U. S. 186, 236 (1961); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 457 (1958). "But it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right." *Young* v. *Regan*, 337 U. S. 235, 238 (1948) (reversing an Illinois case). To permit such tactics of the state courts to continue affirms a denial to those such as petitioner of constitutional rights under the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC., et al., *Plaintiffs,* *vs.* GEORGE E. MAHIN, Successor Director of the Department of Revenue of the State of Illinois, et al., *Defendants.*	No. 68 CH 3536

AMENDED COMPLAINT

COUNT I

Leave of Court first had and obtained, the plaintiff F. W. Koenecke & Sons, Inc., an Illinois corporation, by Rudnick & Wolfe, Jacob Shamberg and Philip J. Simon, its attorneys, files herewith its Amended Complaint, complaining of the defendants, Theodore A. Jones, as Director of Revenue of the Department of Revenue of the State of Illinois, Adlai E. Stevenson III, as State Treasurer of the State of Illinois, and William G. Clark, as Attorney General of the State of Illinois, and alleges as follows:

1. This proceeding is for a declaratory judgment in a case of an actual controversy authorized under Section 57.1 of the Civil Practice Act. An actual controversy exists between the plaintiff and the defendants herein as to the validity and constitutionality of certain amendments of Section 2(b) of the Illinois Cigarette Tax Act as more fully hereinafter set forth.

2. Defendants Theodore A. Jones is now and was at all times material hereto the duly appointed qualified and acting Director of Revenue of the Department of Revenue of the State of Illinois, and was at all times material hereto charged with the responsibility for the general administration and enforcement of the various revenue statutes enacted by the General Assembly of the State of Illinois, including the Act of the General Assembly hereafter referred to in this Amended Complaint.

3. Defendant Adlai E. Stevenson III is now and was at all times material hereto the duly elected and acting State Treasurer of the State of Illinois.

4. Defendant William G. Clark is now and was at all times material hereto the duly elected and acting Attorney General of the State of Illinois.

5. Plaintiff, F. W. Koenecke & Sons, Inc., an Illinois corporation, received its corporate charter from the State of Illinois on May 4, 1953 as the legal successor to a family enterprise founded in the year 1881. It is engaged in the business of import purchasing and selling of cigarettes to wholesalers and retailers within and beyond the borders of the State of Illinois, and has been actively so engaged during the time aforesaid and up to the date hereof. Throughout the course of its pre-corporate and corporate existence, a period totaling some 87 years, its policy of scrupulously fair, honest and conscientious dealings with the wholesale and retail cigarette trade has been highly instrumental in establishing plaintiff in its unique position as the largest cigarette distributor in the midwest.

6. In conjunction with and as a mandatory adjunct to its business of import purchasing and selling of cigarettes, plaintiff comes within the purview of the Illinois statute described as "An Act in relation to a tax upon persons engaged in the business of selling cigarettes, and providing for collection of such tax and penalties for violation of the

Act." Said Act was approved on June 2, 1941, is known as the "Cigarette Tax Act" and has been amended from time to time.

7. For many years last past plaintiff has been and presently is a duly licensed and bonded "distributor" of cigarettes in the State of Illinois as said term "distributor" is defined in Section 1 of the Cigarette Tax Act. Section 2(a) of said Act fixes the tax rate "per cigarette sold, or otherwise disposed of in the course of such business in this State." Section 2(b) requires the distributor "to collect the taxes provided under paragraph (a) hereof," and Section 3 thereof provides in part as follows:

> "Section 3. Payment of the taxes imposed by Section 2 of this Act shall (except as hereinafter provided) be evidenced by revenue tax stamps affixed to each original package of cigarettes. It shall be the duty of each distributor of cigarettes in this State to a purchaser, to firmly affix a proper stamp or stamps to each such package, or (in the case of manufacturers of cigarettes in original packages which are contained inside a sealed transparent wrapper) to imprint the required language on the original package of cigarettes beneath such outside wrapper, as hereinafter provided.
>
> The Department shall sell such stamps only to persons holding valid licenses as distributors under the provisions of this Act."

8. Under the combined impact of Section 2(a), Section 2(b) and Section 3 of the Act, plaintiff is subjected to and placed under a three-fold burden as follows:

> A. It must prepay to the State of Illinois the cost of cigarette tax stamps it purchases from the State to be affixed to the cigarettes it sells.
>
> B. It must firmly affix a proper stamp or stamps to each package of cigarettes it sells in Illinois.
>
> C. It must collect from its vendees, together with the selling price of cigarettes, the cigarette tax stamps it has affixed to said cigarettes.

9. For a long time prior to July 15, 1963, the discount allowed plaintiff on its purchases of cigarette tax stamps under Section 2(b) of the Act was 5% of said purchases. The statutory enactment relative thereto, approved April 14, 1961, is as follows:

> "(b) The taxes as provided under paragraph (a) hereof shall be subject to a discount of 5%, which discount shall be allowed at the time of purchase of the stamps when purchase is required by this act, or at the time when the tax is remitted to the Department without the purchase of stamps from the Department when that method of paying the tax is required or authorized by this Act."

10. At the 1963 session of the General Assembly, said Section 2(b) was amended, approved July 15, 1963, to read as follows:

> "(b) The taxes as provided under paragraph (a) hereof shall be subject to a discount during any year commencing July 1st and ending the following June 30th in accordance with the schedule set out hereinbelow, which discount shall be allowed at the time of purchase of the stamps when purchase is required by this Act, or at the time when the tax remitted to the Department without the purchase of stamps from the Department when that method of paying the tax is required or authorized by this Act. A discount equal to five percent (5%) of the amount of the tax up and to including the first $700,000.00 paid hereunder by such distributor to the Department during any such year; four per cent (4%) of the next $700,000.00 of tax or any part thereof, paid hereunder by such distributor to the Department during any such year; three per cent (3%) of the next $700,000.00 of tax, or any part thereof, paid hereunder by such distributor to the Department during any such year; and two per cent (2%) of the amount of any additional tax paid hereunder by such distributor to the Department during any such year."

11. At the 1965 session of the General Assembly, said

Section 2(b) was again amended, approved July 15, 1965, to read as follows:

"(b) The distributor shall be required to collect the taxes provided under paragraph (a) hereof, and, to cover the costs of such collection, shall be allowed a discount during any year commencing July 1st and ending the following June 30th in accordance with the schedule set out hereinbelow, which discount shall be allowed at the time of purchase of the stamps when purchase is required by this Act, or at the time when the tax is remitted to the Department without the purchase of stamps from the Department when that method of paying the tax is required or authorized by this Act. A discount equal to 2-6/7% of the amount of the tax up to and including the first $700,000.00 paid hereunder by such distributor to the Department during any such year; 2-2/7% of the next $700,000.00 of tax or any part thereof, paid hereunder by such distributor to the Department during any such year; 1-5/7% of the next $700,000.00 of tax, or any part thereof, paid hereunder by such distributor to the Department during any such year; and 1-1/7% of the amount of any additional tax paid hereunder by such distributor to the Department during any such year."

12. At the 1967 session of the General Assembly, said Section 2(b) was subjected to yet another amendment, approved July 15, 1967, reading as follows:

"(b) The distributor shall be required to collect the taxes provided under paragraph (a) hereof, and, to cover the costs of such collection, shall be allowed a discount during any year commencing July 1st and ending the following June 30th in accordance with the schedule set out hereinbelow, which discount shall be allowed at the time of purchase of the stamps when purchase is required by this Act, or at the time when the tax is remitted to the Department without the purchase of stamps from the Department when that method of paying the tax is required or authorized by this Act. A discount equal to 2-2/9% of the amount

of the tax up to and including the first $700,000.00 paid hereunder by such distributor to the Department during any such year; 1-7/9% of the next $700,000.00 of tax or any part thereof, paid hereunder by such distributor to the Department during any such year; 1-1/3% of the next $700,000.00 of tax, or any part thereof, paid hereunder by such distributor to the Department during any such year; and 8/9 of 1% of the amount of any additional tax paid hereunder by such distributor to the Department during any such year,"

13. A summary of the varying statutory discounts allowed plaintiff on its purchases of cigarettes pursuant to said amendatory acts is as follows:

Year 1961

Prior to July 15, 1963, Discount of 5% on all tax stamps purchased.

1963 Amendment

Approved July 15, 1963.

1st $700,000.00 purchased; 5% discount.
2nd $700,000.00 purchased; 4% discount.
3rd $700,000.00 purchased; 3% discount.
All additional purchases; 2% discount.

1965 Amendment

Approved July 15, 1965:

1st $700,000.00 purchased; 2-6/7% discount.
2nd $700,000.00 purchased; 2-2/7% discount.
3rd $700,000.00 purchased; 1-5/7% discount.
All additional purchases; 1-1/7% discount.

1967 Amendment

Approved July 31, 1967.

1st $700,000.00 purchased; 2-2/9% discount.
2nd $700,000.00 purchased; 1-7/9% discount.
3rd $700,000.00 purchased; 1-1/3% discount.
Additional purchases; 8/9 of 1% discount.

1968 Amendment

Approved September 6, 1968.

1st $700,000.00 purchased; 2-2/9% discount.
2nd $700,000.00 purchased; 1-7/9% discount.
3rd $700,000.00 purchased; 1-1/3% discount.
Additional purchases; 8/9 of 1% discount.

14. In firmly affixing the proper stamp or stamps to every package of cigarettes it sells in Illinois, plaintiff is confronted by a mechanical operation of gigantic proportions. Cigarettes purchased by plaintiff from out-of-State manufacturers are shipped into plaintiff's plant in standard cases, each containing 60 cartons with 10 packages of 20 cigarettes in each carton. The total is 600 packages of cigarettes in a case. Every case must be opened, all 60 cartons removed and opened, and a proper tax stamp affixed to each of the 600 packages. Then the cartons must re-sealed and replaced in the case. Tedious, boring and noxious, the operation is extremely costly in machinery, equipment and manpower. While the discount allowed plaintiff on its purchase of cigarette tax stamps under Section 2(b) of the Act is "to cover the costs" of collecting the cigarette tax, included in such costs are the additional costs of stamping and other tangible expenditures necessarily incurred by plaintiff in connection therewith. The minimum discount allowed under each of said amendatory Acts is not sufficient to cover plaintiff's costs for collecting the cigarette tax, and said costs do not decrease with increased collections of said tax.

15. By virtue of its unique position as the largest Cigarette distributor in the midwest, the above and foregoing amendments of 1963, 1965 and 1967 to Section 2(b) of the Act have had a materially adverse and devastating effect on plaintiff's business operations in that, predicated on a declining graduated discount, it is compelled to pay more for the cigarette tax stamps it purchases from the

State of Illinois than its smaller competitors. Plaintiff's purchases of approximately $700,000.00 in tax stamps per week would have the effect of placing it within 30 days of any year in the lowest discount bracket. Presently plaintiff is being allowed the lowest discount, 8/9 of 1% on its purchases of cigarette tax stamps. Said discount amounts to 48 cents per case, a case consisting of 60 cartons with 10 packages of cigarettes in each carton, or a total of 600 packages. Its smaller competitors are allowed varying discounts on their purchases of cigarette tax stamps as follows:

1st $700,000.00—
a discount of $1.20 per case of cigarettes.
2nd $700,000.00—
a discount of $0.96 per case of cigarettes.
3rd $700,000.00—
a discount of $0.72 per case of cigarettes.

16. Plaintiff further avers that the acts of the General Assembly in its successive amendments of 1963, 1965 and 1967 to Section 2(b) of the Act had as their express purpose the intent to enact class legislation to the detriment of plaintiff and to the advantage of its competitors.

17. The Cigarette Tax Act is a revenue measure and not necessarily regulatory in nature. In the long run the amendatory Acts of 1963, 1965 and 1967 to Section 2(b) will have the effect of converting said Act into a restrictive statute with the avowed purpose of placing plaintiff in the untenable position of being unable to compete with smaller cigarette distributors in Illinois by virtue of proportionately smaller discounts on its purchases of cigarette stamps.

18. Throughout the course of its corporate and pre-corporate existence, the plaintiff has invested large sums of capital in machinery, equipment, supplies and improvements essential to the operation and maintenance of its

business. Its said machinery, equipment, supplies and improvements are adopted specifically to the cigarette business, particularly the stamping of cigarettes pursuant to statutory requirements. Plaintiff repays about $40,000,000.00 annually in cigarette tax stamps purchased from the State of Illinois, which said sum is approximately one-third (1/3) of the State's entire revenue realized from the Cigarette Tax Act for a 12-month period. In the event that the defendants are not restrained from enforcing the 1963, 1965 and 1967 amendments to Section 2(b) of the Act, plaintiff will eventually be forced to discontinue its business operations, and thereby will suffer irreparable injury and damages.

19. Plaintiff alleges that the 1963, 1965 and 1967 amendments to Section 2(b) of the Cigarette Tax Act, as aforesaid, and each of them, are invalid and unconstitutional, being in violation or contravention of the Constitution of Illinois, for the following reasons:

(a) Said amendatory Acts arbitrarily subject plaintiff to special burdens and obligations from which its competitors are exempt. This is in violation of Section 22 of Article IV of the Illinois Constitution.

(b) Said amendatory Acts are so capricious, arbitrary and wilful as to deprive plaintiff of its right to due process of law in violation of Section 2 of Article II of the Illinois Constitution.

(c) Said amendatory Acts are in violation of Section 13 of Article II of the Illinois Constitution.

(d) Said amendatory Acts do not act uniformly upon all licensed cigarette distributors in the State of Illinois and therefore are in violation of Sections 1 and 2 of Article IX of the Illinois Constitution.

20. Plaintiff further alleges that the 1963, 1965 and 1967 amendments to Section 2(b) of the Cigarette Tax Act, as aforesaid, and each of them, are invalid and uncon-

stitutional, being in violation or contravention of the United States Constitution, for the reason that they deprive plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, and deprives the plaintiff of equal protection of the laws guaranteed by the 14th Amendment to the United States Constitution."

Wherefore, plaintiff prays as follows:

1. That this Court enter a finding declaration supported by its order, judgment or decree, that the 1963, 1965 and 1967, and 1968 amendatory Acts of Section 2(b) of the Cigarette Tax Act, and each of them, are invalid and unconstitutional.

2. That the Court further decree that, by reason of the unconstitutionality of said 1963, 1965 and 1967 and 1968 amendatory Acts of Section 2(b) of the Cigarette Tax Act, said Section 2(b) of the Act, as approved April 14, 1961, is left in full force and effect as it existed prior to the adoption of said amendatory Acts.

3. That the Court enter a permanent injunction enjoining and restraining the defendants, Theodore A. Jones, as Director of Revenue of the Department of Revenue of the State of Illinois, Adlai E. Stevenson III, as State Treasurer of the State of Illinois, and William G. Clark, as Attorney General of the State of Illinois, and their respective officers, agents, employees, deputies and successors in office, from enforcing or attempting to enforce the provisions, or any part thereof, of said 1963, 1965 and 1967 and 1968 amendatory Acts of Section 2(b) of the Cigarette Tax Act.

4. That plaintiff be granted such other or further relief in the premises as to the Court may seem meet.

Count II.

Plaintiff, F. W. Koenecke & Sons, Inc., an Illinois corporation, by Rudnick & Wolfe, Jacob Shamberg and Philip J. Sinnon, its attorneys, as Count II of its Amended Complaint filed by leave of Court first had and obtained, complains of the defendants, Theodore A. Jones, as Director of Revenue of the Department of Revenue of the State of Illinois, Adlai E. Stevenson III, as State Treasurer of the State of Illinois, and William G. Clark, as Attorney General of the State of Illinois, and alleges as follows:

1. Plaintiff is proceeding in this Count under and pursuant to the provisions of the Illinois statute known as "An Act in relation to the payment and disposition of moneys received by officers and employees of the State of Illinois by virtue of their office or employment," Illinois Revised Statutes, Chapter 127, paragraphs 170 et seq. approved June 9, 1911, as amended.

2-20. Plaintiff repeats and realleges each and every allegation contained in paragraphs 2 to 20 inclusive of Count I as paragraphs 2 to 20 inclusive of Count II as if fully set forth herein verbatim.

21. Plaintiff is being presently allowed a discount of 8.9 of 1% on its purchases of cigarette tax stamps pursuant to the provisions of the 1967 amendment to Section 2(b) of the Cigarette Tax Act. In the event that the amendatory Acts of 1963, 1965 and 1967 of said Section 2(b) should be held invalid and unconstitutional, the discount allowed plaintiff on said purchases of cigarette tax stamps would revert to a flat 5% of said purchases, pursuant to the provisions of said Section 2(b) prior to July 15, 1963. The differential between plaintiff's present discount of 8.9 of 1% and the discount of 5% as it existed prior to July 15, 1963, is 4.1 9%.

22. Within thirty (30) days prior to the filing of this Complaint, plaintiff has made payment of taxes as evidenced by purchases of cigarette tax stamps from the Department of Revenue and has paid 4-1 9% thereof under protest and will so continue during the pendency of this action to make purchases of cigarette tax stamps and pay 4-1 9% thereof under protest pursuant to the provisions of said Act entitled "An Act in relation to the payment and disposition of moneys received by officers and employees of the State of Illinois by virtue of their office or employment."

23. Under and pursuant to the provisions of said Act, it is the duty of Adlai E. Stevenson III, as State Treasurer of the State of Illinois, to place said funds so paid and received under protest in a special fund known as a protest fund. Said Act provides that said funds shall be transmitted from the protest fund to the appropriate fund in which it would have been placed had there been no protest, unless the party making such protest shall file a complaint in chancery and obtain within 30 days a temporary injunction restraining such transfer. Plaintiff avers that, unless said defendant Adlai E. Stevenson III is restrained from transferring said funds out of the protest fund, said funds will forever be lost to plaintiff.

24. Plaintiff has no adequate remedy at law with respect to payments heretofore and to be hereafter made under protest pending the disposition of this cause, except under and pursuant to the provisions of said Act in relation to the payment and disposition of moneys received by officers and employees of the State.

Wherefore plaintiff prays as follows:

1. That the Court issue its temporary writ of injunction enjoining and restraining Theodore A. Jones, as Director of Revenue of the Department of Revenue of the State

of Illinois, his deputies, attorneys, agents, servants, employees and successors in office, from paying or disbursing into the State Treasury the sums of money paid by the plaintiff under protest, being 4-1 9% of its gross cigarette tax stamps purchased under the Illinois "Cigarette Tax Act," Ill. Rev. Stat., Ch. 120, Paragraphs 453.1 et seq., during the pendency of this action and until the final determination of this cause, in any manner except in accordance with the provisions of "An Act in Relation to the Payment and Disposition of Moneys Received by Officers and Employees of the State of Illinois by virtue of their office or Employment," Ill. Rev. Stat., Ch. 127, Sec. 170, et seq.

2. That the Court further issue its temporary writ of injunction enjoining and restraining Adlai E. Stevenson III, as State Treasurer of the State of Illinois, his deputies, attorneys, agents, servants, employees and successors in office, from transferring any funds paid into the "Protest Fund" by plaintiff, being funds representing taxes paid under the Amendment to Sec. 2 of the Illinois "Cigarette Tax Act" (Ill. Rev. Stat. Ch. 120, Sections 451.1 et seq.) and paid under protest by plaintiff to the Director of the Department of Revenue, and by him transferred to said State Treasurer during the pendency of this suit, and until the further order of this Court; and that the said Adlai E. Stevenson III, as Treasurer of the State of Illinois, be restrained and enjoined from transferring from the Protest Fund any moneys hereinafter paid under protest by the plaintiff during the pendency of this suit.

3. That the Court enter an order directing the defendants herein to refund, return and repay to the plaintiff any and all funds paid by said plaintiff under protest and which were not due the State of Illinois by virtue of the invalidity and unconstitutionality of said amendatory Acts

of 1963, 1965 and 1967 and 1968 to Section 2(b) of the Cigarette Tax Act.

4. That plaintiff have such other and further relief in the premises, including an allowance to plaintiff for its reasonable costs and attorneys' fees incurred in this cause, as equity may require and to the Court may seem meet.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC., et al.,
Plaintiffs,
vs.
GEORGE E. MAHIN, Successor Director of the Department of Revenue of the State of Illinois, et al.,
Defendants.

No. 68 CH 3536

MOTION OF DEFENDANT TO DISMISS THE AMENDED COMPLAINT

Now come the defendants, Theodore A. Jones, Director of Revenue of the Department of Revenue of the State of Illinois, Adlai E. Stevenson, III, State Treasurer of the State of Illinois, and William G. Clark, Attorney General of the State of Illinois, and move the Court to dissolve the temporary injunction heretofore issued, to strike the amended complaint and to dismiss the above entitled cause, and as grounds for said motion the defendants show unto the Court that the amended complaint is without equity and is substantially insufficient in law and does not state a cause of action for the following reasons:

(1) That the Amended Complaint is insufficient in that it fails to allege or aver any facts or circumstances sufficient to warrant any relief under Section 57.1 of the Civil Practice Act, relating to Declaratory Judgments;

(2) That the construction of Section 2 of The Cigarette Tax Act, as amended, Ch. 120, Sec. 453.2, Ill. Rev. Stat. 1967, and Section 3 of the Cigarette Use Tax Act, Ch. 120, Sec. 453.33, Ill. Rev. Stat. 1967, which result in the imposi-

tion of the tax on plaintiff's transactions described in the complaint filed herein is a proper construction and interpretation of said Acts, as amended.

(3) The classification by which the cigarette tax discount is measured in accordance with the schedule as set forth in said Acts, as amended, is both reasonable and proper and cannot be deemed to violate the Federal or State constitutions.

(4) The plaintiff misconceives the nature of the Cigarette Tax Act and the Cigarette Use Tax Act as being property taxes.

(5) Notwithstanding the plaintiff's assertion to the contrary, the 1963, 1965 and 1967 Amendments to Section 2B of the Cigarette Tax Act assailed in this Amended Complaint are in all respects valid and constitutional as are the actions of the defendants which this suit seeks to enjoin. More particularly, neither Section 2b of the Cigarette Tax Act, as amended in 1963, 1965 and 1967, nor any actions of these defendants in enforcing the Cigarette Tax Act, as amended, violate the Federal or State Constitutions in any respect whatsoever, as alleged in said Amended Complaint.

Wherefore, these defendants move that the said Amended Complaint filed in this cause be stricken; that the temporary injunction heretofore issued by dissolved; that this cause be dismissed for want of equity and that these defendants may be henceforth discharged with their reasonable costs and charges most wrongfully sustained.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC., et al.,
Plaintiffs,
vs.
GEORGE E. MAHIN, Successor Director of the Department of Revenue of the State of Illinois, et al.,
Defendants.

No. 68 CH 3536

OPINION

This matter appears before the Court upon Plaintiff's amended complaint for declaratory judgment and injunctive relief and defendants' motion to dissolve the injunction heretofore granted and to strike and dismiss the amended complaint.

Plaintiff in Count I seeks a declaration by the Court that the 1963, 1965, 1967 and 1968 amendments to Section 2(b) of the Cigarette Tax Act and each of them are invalid and unconstitutional.

Under Count 2 plaintiff sought and was granted a temporary injunction restraining the Director of Revenue of the State of Illinois, his deputies, attorneys, agents, servants, employees and successors in office from paying or disbursing into the State Treasury the sum of money paid by the plaintiff under protest, and restraining the State Treasurer, his deputies, attorneys, agents, servants, employees and successors in office from transferring any of the monies paid under protest during the pendency of this suit.

Plaintiff alleges that for many years it has been a licensed distributor of cigarettes in the State of Illinois

as the term is defined under Section 1 of the Cigarette Tax Act, and as such is required to collect the tax provided for under the Act. Under the Act all distributors were and are required to purchase cigarette tax stamps from the State, affix the stamp to each package of cigarettes sold in Illinois, and to collect from its vendee the amount represented by the stamps along with the selling price of the cigarettes.

Under the Act as it existed prior to July 15, 1963, a distributor was allowed a discount of 5% at the time of the purchase of the stamps to reimburse the distributor for the cost of affixing the stamps. Commencing in 1963 the flat 5% discount was discarded and a new system of discounts was adopted, predicated on a declining graduated discount related to the number of stamps purchased in any year commencing July 1 and ending June 30 the following year. Subsequent amendments were adopted in 1965, 1967 and 1968, the effect of which were to reduce the statutory discount, a summary of which is as follows:

Year 1961

Prior to July 15, 1963. Discount of 5% on all tax stamps purchased.

1963 Amendment

Approved July 15, 1963.

1st $700,000.00 purchased; 5% discount.
2nd $700,000.00 purchased; 4% discount.
3rd $700,000.00 purchased; 3% discount.
All additional purchases; 2% discount.

1965 Amendment

Approved July 15, 1965.

1st $700,000.00 purchased; 2-6/7% discount.
2nd $700,000.00 purchased; 2-2/7% discount.
3rd 790,000.00 purchased; 1-5/7% discount.
All additional purchases; 1-1/7% discount.

1967 Amendment

Approved July 31, 1967.

1st $700,000.00 purchased; 2-2/9% discount.
2nd $700,000.00 purchased; 1-7/9% discount.
3rd $700,000.00 purchased; 1-1/3% discount.
Additional purchases; 8/9 of 1% discount.

1968 Amendment

Approved Sept. 6, 1968.

1st $700,000.00 purchased; 2-2/9% discount.
2nd $700,000.00 purchased; 1-7/9% discount.
3rd $700,000.00 purchased; 1-1/3% discount.
Additional purchase; 8/9 of 1% discount.

Plaintiff charges in its complaint that the said paragraph (b) of Section 2 of the Act relating to the discount granted to distributors and which graduates the rates on a declining basis based on gross sale of tax stamps to distributors was and is intended to specifically injure the plaintiff by placing it at a competitive disadvantage with respect to all other distributors in the State of Illinois, and in its amended complaint, that the amendments to Section 2(b) had as its express purpose the intent to enact class legislation to the detriment of the plaintiff and to the advantage of its competitors.

The Court does not believe that the General Assembly would deliberately enact legislation specifically intended to injure plaintiff or provide an advantage to competitors of the plaintiff.

The Legislature has broad discretion in establishing the classes and sub-classes which are to be taxed (Fiorito v. Jones, 39 Ill. 2d 531) and the basis on which classes are determined need only be reasonable. Mutual Tobacco Co. v. Halperin, 414 Ill. 226. If the tax is otherwise reasonable in relation to the privilege granted, the fact that it bears

more heavily on one than another is irrelevant. Grenier & Co. v. Stevenson, et al., 42 Ill. 2d 289.

In Mansfield v. Carpentier, 6 Ill. 2d 455, the Court said:

> "The formula imposing a particular tax is no measure of its constitutionality so long as it is a reasonable exercise of legislative judgment. Neither is the fact that a tax may put some individual out of business considered a valid argument against the tax if the tax otherwise is reasonable in relation to the cost of the highways or the abstract value of the privilege of using them."

In Mutual Tobacco Co. v. Halperin, 414 Ill. 226:

> "Absolute equality is impractical in taxation and is not required by the Equal Protection Clause of the Constitution. * * * Perfect equality and uniformity of taxation as regards individuals or corporations or the different classes properly subject to taxation is a dream unrealized."

It is the opinion of the Court that the Amendatory Acts do not violate Section 22 of Article 4, Section 2 of Article 2, Section 13 of Article 2, and Sections 1 and 2 of Article 9 of the Constitution of the State of Illinois, nor do they violate the Fourteenth Amendment to the Constitution of the United States.

An appropriate decree may be presented dissolving the temporary injunction heretofore granted in this cause, and dismissing the amended complaint for want of equity.

On July 2, 1969, a Decree was entered:

This cause coming on to be heard on the motion of George E. Mahin, Successor Director of Revenue of the Department of Revenue of the State of Illinois, by William J. Scott, Attorney General of the State of Illinois, to dismiss plaintiffs' complaint, as amended, and after having heard arguments of counsel and being advised in the prem-

ises and having jurisdiction over the parties and the subject matter:

It Is Ordered that the motion to Strike and Dismiss plaintiffs' complaint, as amended, be and the same is hereby sustained and plaintiffs' complaint, as amended, is hereby dismissed, for want of equity.

It Is Further Ordered that all orders granting temporary injunctions in this cause be and the same are vacated and set aside and all injunctions dissolved accordingly.

It Is Further Ordered that Adlai E. Stevenson III, Treasurer of the State of Illinois, be and is directed to transfer all sums now held in the protest fund into the General Revenue Fund of the State of Illinois upon the expiration of thirty (30) days from the date hereof and provided an appeal has not then been perfected.

It Is Further Ordered that pending an appeal of the cause by the plaintiffs that the Treasurer of the State of Illinois shall keep the amounts heretofore and hereafter paid in such protest fund until the final order of this Court as to the disposition thereof.

It Is Further Ordered that the written opinion heretofore issued by the Court is hereby incorporated herein and expressly made a part of this Decree.

It Is Further Ordered that the above entitled cause be and the same is hereby dismissed.

ENTER:

/s/ THOMAS C. DONOVAN
Judge

Date July 2, 1969

OPINION SUPREME COURT OF ILLINOIS
United States of America

STATE OF ILLINOIS
SUPREME COURT } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of November in the year of our Lord, one thousand nine hundred and seventy, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, *Chief Justice*
JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE CASWELL J. CREES
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE JOHN T. CULBERTSON, JR.
JUSTICE MARVIN F. BURT
WILLIAM J. SCOTT, *Attorney General*
ROBERT G. MILEY, *Marshal*
Attest: JUSTIN TAFT, *Clerk*

Be It Remembered, that afterwards, to-wit, on the 4th day of December, 1970 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

GLENN R. HEYMAN, Trustee, etc., *Appellant* vs. GEORGE E. MANIX, Successor Director of the Department of Revenue of the State of Illinois, et al., *Appellees*	Appeal from Circuit Court Cook County

Docket No. 42544—Agenda 43—May, 1970.

GLENN R. HEYMAN, Trustee, Appellant, *vs.* GEORGE E. MANIX, Director of Revenue, *et al.*, Appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The question presented by this appeal is whether the graduated discounts allowed distributors under the Cigarette Tax Act (Ill. Rev. Stat. 1969, ch. 120, par. 453.2) violate the uniformity provisions of section 1 of article IX of the Illinois constitution and the equal-protection clause of the Federal constitution.

F. W. Koenecke & Sons, Inc., filed its amended complaint in the circuit court of Cook County seeking a declaration that the 1963, 1965, 1967 and 1968 amendments to section 2(f) of the Cigarette Tax Act are unconstitutional and sought to recover sums of money paid to the State under protest. A motion to dismiss was filed by defendants, the Director of the Department of Revenue, the State Treasurer, and the Attorney General. Thereafter, Glenn R. Heyman, as trustee in bankruptcy of the plaintiff, was permitted to join the action and the amended complaint was adopted by him as his pleading. The circuit court found each of the amendatory acts to be constitutional and dismissed the amended complaint. Appeal from that judgment is directed to this court pursuant to Rule 302(a)(2).

The Cigarette Tax Act as originally enacted in 1941 levied a tax on persons engaged in business as distributors of cigarettes in this State measured by the number of cigarettes sold or otherwise disposed of in the course of such business in this State and allowed each distributor a 5% discount on the amount of tax remitted to the State. (Ill. Rev. Stat. 1941, ch. 120, par. 453.2) The Act was later amended to declare that the impact or incidence of the tax was on the retailer, but the distributor remained responsible for payment of the tax and entitled to the discount on the amount of tax remitted to the State. (Ill. Rev. Stat. 1965, ch. 120, par. 453.2.) This amendment changing the incidence of the tax was apparently passed to give the consumer a deduction on his Federal income tax return. 52 I. B. J. 124, 130.

In 1963 the flat 5% discount rate granted to cigarette distributors was discontinued and replaced with a graduated declining discount rate measured by the dollar amount of tax stamps purchased in any year commencing July 1 and ending June 30 of the following year. (Ill. Rev. Stat. 1963, ch. 120, par. 453.2.) The discount rate as adopted in 1963 and its revisions in 1965 and 1967 is as follows:

1963 Amendment

First $700,000 of tax paid	—5% discount
Second $700,000 of tax paid	—4% discount
Third $700,000 of tax paid	—3% discount
All additional tax paid	—2% discount

1965 Amendment

First $700,000 of tax paid	—2 6/7% discount
Second $700,000 of tax paid	—2 2/7% discount
Third $700,000 of tax paid	1 5/7% discount
All additional tax paid	—1 1/7% discount

1967 Amendment

First $700,000 of tax paid —2 2/9% discount
Second $700,000 of tax paid—1 7/9% discount
Third $700,000 of tax paid —1 1/3% discount
All additional tax paid — 8/9% of 1% discount

The 1968 amendment continued the discount rate of the 1967 amendment.

F. W. Koenecke & Sons, Inc., was chartered in 1953 as the legal successor to a family business started in 1881 and is the largest cigarette distributor in the Midwest. Its business is the import-purchasing of cigarettes from the manufacturer and the selling of the cigarettes to wholesalers and retailers both inside and outside of the State. Being a distributor within the definition of the Cigarette Tax Act, it must purchase cigarette tax stamps from the State and affix the stamps to each package of cigarettes it sells in the State.

Cigarettes purchased by plaintiff are shipped to its plant in standard cases. Each case contains 60 cartons with 10 packages of 20 cigarettes in each carton or a total of 600 packages of cigarettes in each case. Each case must be opened, all 60 cartons are removed and opened, a tax stamp is affixed to each of the 600 packages, and the cartons are then resealed and replaced in the case. Plaintiff has special machinery, equipment and personnel to perform this operation.

Plaintiff purchases approximately $700,000 of tax stamps a week and about $40,000,000 of the stamps in the course of a year. This volume of tax stamp purchases puts plaintiff in the lowest discount bracket within the first month of a year's operation. The complaint also alleges that the minimum discount is not sufficient to cover its costs for collecting the cigarette tax and that the cost of

collecting the tax does not decrease with the increased amount of tax collected.

Assuming the allegations of plaintiff's complaint to be true, the inverse volume discount is discriminatory and places a heavier burden on the larger distributors. Of course, the Illinois and Federal constitutions only protect a taxpayer from invidious discrimination (*Dodin v. Korshak*, 39 Ill. 2d 534; *Metropolis Theatre Co. v. City of Chicago*, 228 U. S. 61, 57 L. Ed. 730, 33 S. Ct. 441) and the fact that a tax bears more heavily on one taxpayer than another does not of itself violate the uniformity provision of the Illinois constitution or the equal-protection clause of the Federal constitution. *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289; *Fox v. Standard Oil Co. of New Jersey*, 294 U. S. 87, 79 L. Ed. 780, 55 S. Ct. 333.

We note initially that the cigarette tax is imposed at a flat rate measured by the number of cigarettes sold. It is clear that if the tax were imposed at a graduated rate measured by the number of cigarettes sold, it would be unconstitutional. In *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 79 L. Ed. 1054, 55 S. Ct. 525, the Supreme Court held that a graduated tax on retailers measured by the gross receipts from sales violated the equal-protection clause of the fourteenth amendment. The court found there was no reasonable relation of gross sales to net profit and consequent ability to pay; and, therefore, there exists no reasonable relation of a tax measured by gross sales to the value of the privilege of merchandising. It concluded by stating: "The law arbitrarily classifies these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege the enjoyment of which is said to be the subject taxed. It exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act

offener than the other." 294 U. S. 550, 566, 79 L. Ed. 1054, 55 S. Ct. 525, 530.

The expressed purpose of the graduated discount allowed to distributors under the Cigarette Tax Act is to cover the distributors' cost of collecting the tax imposed by the Act. Plaintiff asserts, however, that there is no reasonable relationship between the graduated discount and the cost of collecting the tax. It first points out that the amended complaint alleges, and that it is prepared to prove, that the minimum discount allowed under the Act is not sufficient to cover its cost of collecting the tax and that the cost of collecting the tax does not decrease with increased collections of the tax.

It also refers to the fact that in 1963, when the graduated discount was introduced, the cigarette tax was 6¢ per package; that the discount brackets have not been changed since that time; that the discount rates have been reduced; and that the tax has been raised to 12¢ per package. It states that even without the reduction in the discount rates, the increase of the tax rate without changing the discount brackets has reduced the discount during a period of increased costs of collecting the tax and demonstrates that there is no reasonable relation between the statutory discount and the cost of collecting the tax.

Plaintiff has also attached to its brief, as an exhibit, a summary of statutes from other States which impose a cigarette tax. The exhibit shows that, except for Hawaii, all States and the District of Columbia impose a tax on cigarettes and require the affixing of a tax stamp or meter mark on each package of cigarettes. Each State allows the person required to affix the stamp or meter mark a discount. Twenty-four States expressly provide that the purpose of the discount is to compensate for the cost of affixing the stamp or meter mark. There is a great variation in the

discount rates allowed by the various States ranging from 2% in Louisiana to 25% in California. Another exhibit shows the dollar amount of discount allowed per 1,000 packages of cigarettes varies from $7.50 in Alabama to $10 in Michigan. Plaintiff states these exhibits demonstrate that although the purpose of the discount in all States is to compensate for the cost of affixing the tax stamps or meter marks and although the cost of doing so would be approximately the same in all States, there is a great divergence among the States as to rate of discount and the amount of discount. The conclusion plaintiff draws from these exhibits is that the legislative judgments in this field have been arbitrary.

We note parenthetically that the exhibits indicate there are five other States—Florida, Minnesota, New Mexico, New York, and North Dakota—that use a graduated discount. Apparently the constitutionality of the graduated discount has never been challenged in those States.

It is apparent that the graduated discount which is geared to the volume of cigarettes sold in a year has the same ultimate effect as the graduated tax measured by sales which was condemned in *Stewart Dry Goods*. Furthermore, the exhibits and allegations of plaintiff's complaint tend to support its contention that there is no reasonable relation between the graduated discount and the cost of collecting the tax, and defendants have not argued that there is such a relationship. The statute itself, however, states that the discount is to cover the cost of collecting the tax and by graduating the discount it implies that the cost of collection decreases with the number of stamps bought and affixed.

The legislature, of course, has broad powers to enact taxing laws which affect some persons differently than others as long as there is a reasonable state of facts to

justify the discrimination (*Boodin v. Koerbel*, 39 Ill. 2d 521); and a determination by the legislature is presumed supported by facts known to it, under facts judicially known (*Ohio Oil Co. v. Wright*, 286 Ill. 236) or proved (*Duncan v. Holman*, 8 Ill. 2d 87) to show otherwise. We are of the opinion that the facts alleged in the complaint conflict with the legislative determination to such an extent that the graduated discount would be invalid, and plaintiff is entitled to an opportunity to prove these allegations.

The judgment of the circuit court of Cook County is reversed and the cause is remanded for further proceedings.

Reversed and remanded.

IN THE SUPREME COURT OF ILLINOIS

GLENN R. HEYMAN, Trustee in Bankruptcy of F. W. Koeltzecke & Sons, Inc.,
Plaintiff-Appellant,
vs.
GEORGE S. MAHIN, Successor Director of the Department of Revenue of the State of Illinois; et al.,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County.

Honorable THOMAS DONOVAN, Judge Presiding.

PETITION FOR REHEARING.

Now comes George E. Mahin, Successor Director of the Department of Revenue of the State of Illinois, John Lewis, as Treasurer of the State of Illinois and William J. Scott, Attorney General of the State of Illinois, defendants-appellees, and petition that the Court grant a rehearing in the above entitled matter and in support thereof state the following:

1). The lower court, if it is to fix compensation against the State of Illinois, has no jurisdiction under the Illinois Constitution to hear the case. The State of Illinois, under Article IV, Section 26 of the Illinois Constitution, has no jurisdiction over nor can it consent to such jurisdiction, in any case brought against it except in the Court of Claims.

While it is true that an individual agent of the State may be enjoined from exercising an unconstitutional act, the Court can not award any judgment against the State except in the Court of Claims and the limit recoverable against the State in the Court of Claims is the sum of $25,000. Therefore, if plaintiff be successful in the court

below, he would only recover a void judgment. We believe the Court should clearly limit its action in view of the jurisdictional prohibition.

2] The Court, in its opinion handed down on December 4, 1970, held, that there was no apparent reasonable relationship between the method of compensation set forth in the statute allowing discounts to compensate the dealer for expense involved in collecting the tax by the increase in volume of sales and cost involved in collecting the taxing and stamping of the cigarette packages.

3] If a rehearing is not granted, many dealers will contest the fairness of the discount allowed or compensation provided under the statute and demand a jury trial in the hope that a jury or court may reward them with substantial compensation.

4] The recent decision of this Court on Docket No. 43021—Agenda 71; September 1970, (*Sherman-Reynolds, Inc.* Appellant, v. *George E. Makin*, Director of Revenue), the Court, referring to the extent put to an employer by reason of the withholding tax on compensation paid to employees, said:

> "Plaintiff's claim that employers have a constitutional right to compensation for their services and expenses incurred in withholding tax is bottomed on the guarantees of the State and Federal constitutions that no person shall be deprived of property without due process of law. (Ill. Const., art. II, § 2; U. S. Const. amend. XIV.) and upon the similar provisions in each constitution which direct that private property shall not be taken for public use without just compensation. (Ill. Const., art. II § 13; U. S. Const., amend. V.) And the broad sweep of its initial argument here is that these constitutional provisions are self-executing, making it incumbent upon the judiciary to ascertain and award just and reasonable compensation. Although the uncompensated withholding tax by employers has been the practice in the Federal

government for many years, the issue here presented, so far as we have been informed and can ascertain, appears to be one of first impression. *Kellems v. United States* (D. C. Conn. 1951), 97 F. Supp. 681, relied upon to some degree by defendants, is not helpful. Its only holding was that an employer's "belief" that the Federal Withholding Act (26 U. S. C. A. § 1621 *et seq.*) was unconstitutional, did not relieve such employer from penalties assessed for failure to comply with the Act. The presumptive constitutional validity of the Act permitting withholding was not attacked in the manner that our own act is challenged in this case.

"As a consequence, plaintiff seeks to persuade us on the basis of principles and analogies diligently drawn from factually inapposite decisions applying the constitutional provisions upon which it seeks to rely. We see no useful purpose to be served by analyzing each decision cited, or in setting forth the various approaches of plaintiff in detail. For even if it be agreed that a "right" to compensation flows to plaintiff from the guarantees of due process of law, or from the constitutional commands relating to the taking of private property for public use, or both, such right is subordinate to the police power of the State employed here in support of the authority to tax and, in our view, any "loss" or "taking" of property occasioned by an employer's compliance with the withholding provisions of article 7 is *damnum absque injuria*."

Furthermore, the taking of property or the imposing of expense by the State in the exercise of valid police power does not put an obligation upon the State to reimburse the party put to the expense. The many cases of corporations who have to file numerous reports with governmental bodies clearly illustrate that there is no obligation for reimbursement.

5] The obvious result of such a situation will not only be to engulf the courts with numerous trials, but will con-

stitute the court and jury as a legislature to fix the compensation in each case. If this occurs, there obviously would be no uniformity of compensation, no equal protection of the laws to each dealer, no equal protection of the law, or uniform method of allowing costs to the taxpayer.

The judiciary has no right to exercise legislative discretion and set what it deems to be reasonable compensation for expenses entailed. A recent Arizona Supreme Court decision (*Apache* v. *Atchison, Topeka, Santa Fe Railroad*, No. 9946 (1970)) stated:

> "It is the State's position that the placing of railroad properties in a classification requiring their assessment at 60% of full cash value is a constitutional exercise of legislative discretion and that the reduction from 60% to 40% ordered by the Supreme Court was a *judicial reclassification* wholly *unauthorized by law*. It is the railroads' position that the statute under which the 60% assessment was levied was unconstitutional and that all taxes paid under protest, not simply the difference between 40% and 60% of the full cash value of their properties, may be recovered." (Emphasis supplied.)

6] Furthermore, would not the judgment of the circuit courts and the taking of jurisdiction by the circuit courts violate Section 26 of Article IV of the Illinois Constitution which prohibits the State from being sued in any forum except in the Court of Claims of Illinois.

7] If instead o the State being sued, the Director of the Department of Revenue George E. Mahin be classified as an individual defendant, would the Article of the Illinois Constitution be thwarted and bypassed by a subterfuge?

8] We are informed that there are now seven additional cases pending in the circuit courts using the language of the complaint in the case at bar seeking to contest the compensation provided under the statute. This would

produce the results that each discount as to each vendor would have to be litigated separately.

not a similar jam result and the State collection of taxes be seriously affected?

9] Furthermore, if an accepted principle generally recognized in business that the greater the volume, the lesser the overhead and the lesser the cost, motivated the Legislature in passing the statute fixing the compensation of the dealer, can it be urged that the adoption of an accepted standard violates the Due Process Clauses of the Constitution of the State of Illinois, Sec. 2, Article II and United States Constitution Fourteenth amendment?

The Court in its opinion stated that "the express purpose of the graduated discount allowed to distributors under the Cigarette Tax Act is to cover the distributors cost of collecting tax imposed by this Act."

The Court overlooks the fact that legislature did not indicate that the allowance for cost was to cover all costs of each and every distributor. The court overlooks the fact that the legislature need not have given any discount whatsoever to cover any cost for collection of the tax. Therefore, whatever discount or discounts the legislature did grant was merely a bounty on the part of the legislature which need not be uniform, is not a tax and need not be given at all. 16 Am. Jur. 2nd Constitutional Law, Sec. ....., *Chicago Burlington & Quincy Railroad Co.* v. *Ill. ex rel. Greenwood*, 206 U. S. 561, 56 L. Ed. 596, 26 S. Ct. 341. If the plaintiff does not wish to accept the gift, they do not need to. The plaintiff has admitted that the full tax imposed upon the retailer has been collected by the plaintiff. Said tax as pointed out by the Court was a flat rate and not a graduated tax.

10] The general principle usually applied in such an instance is not whether in each case the method of com-

pensation is fair or reasonable, but whether in general the method follows an accepted practice or standard in business.

11] The plaintiff and the Court have alluded to various acts of other states as an indication that there is no reasonable relationship between the graduated discount and the cost of collecting the tax. The acts or intent of the legislature of other states should have no bearing upon the intention of the legislature of the State of Illinois.

12] We further observe that there is no law compelling anyone to go into the cigarette vending business and even if in an individual case the cost of collecting the tax and the stamping of the cigarette packages exceeds the compensation or discount, such result should not entitle a dealer to sue the State of Illinois in any court, possibly other than in the Court of Claims.

We earnestly urge that a rehearing be granted so that the chaotic consequences, both to the State of Illinois and to the dealers involving delegation of legislative powers to the judiciary causing unequal protection of the laws and a "hit or miss" system clearly not contemplated by the Constitution of the State of Illinois nor by the Illinois Legislature.

Respectfully submitted,

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OPINION SUPREME COURT OF ILLINOIS
United States of America

STATE OF ILLINOIS }
SUPREME COURT } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, *Chief Justice*
Justice WALTER V. SCHAEFER
Justice DANIEL P. WARD
Justice JOSEPH H. GOLDENHERSH
Justice THOMAS E. KLUCZYNSKI
Justice CHARLES H. DAVIS
Justice HOWARD C. RYAN
WILLIAM J. SCOTT, *Attorney General*
ROBERT G. MILEY, *Marshal*
Attest: JUSTIN TAFT, *Clerk*

BE IT REMEMBERED, that afterwards, to-wit, on the 30th day of September, 1971 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

GLENN R. HEYMAN, Trustee, etc., *Appellant*,
vs.
GEORGE E. MAHIN, Successor Director of the Department of Revenue of the State of Illinois, et al., *Appellees*.

No. 42544

Appeal from Circuit Court Cook County

Docket No. 42544—Agenda 59—March, 1971.

GLENN R. HEYMAN, Trustee, Appellant, *vs.* GEORGE E. MAHIN, Director of Revenue, et al., Appellees.

MR. JUSTICE RYAN delivered the opinion of the court:

This is an appeal from the circuit court of Cook County which upheld the constitutionality of the graduated discounts allowed to distributors under the Cigarette Tax Act. Ill. Rev. Stat. 1969, ch. 120, par. 453.2.

F. W. Koenecke and Son, Inc. filed an amended complaint which seeks a declaration that the 1963, 1965, 1967 and 1968 amendments to section 2(b) of the Cigarette Tax Act are unconstitutional as violating the uniformity provision of section 1 of article IX of the Illinois constitution and the equal protection clause of the fourteenth amendment of the Federal constitution. The plaintiffs seeks to recover sums of money paid to the State under protest. The defendants, the Director of the Department of Revenue, the State Treasurer and the Attorney General filed a motion to dismiss. Glenn R. Heyman, as trustee in bankruptcy of plaintiff, was permitted to intervene in the cause on behalf of the plaintiff and to adopt the amended complaint as his pleading. The circuit court found each of the amendatory acts to be constitutional and dismissed the amended complaint. This appeal is from that judgment, pursuant to Rule 302(a) (2), then in effect.

The Cigarette Tax Act as originally enacted in 1941 levied a tax on persons engaged in business as distributors of cigarettes in the State measured by the number of cigarettes sold or otherwise disposed of in this State in the course of such business and allowed each distributor a 5% discount on the amount of tax paid to the State. (Ill. Rev. Stat. 1941, ch. 120, par. 453.2.) In *Johnson* v. *Daley*, 403 Ill. 338, this court held the Cigarette Tax Act to be an occupation tax and in *Mutual Tobacco Co.* v. *Halpin*, 414 Ill. 226, this court stated that the Cigarette Tax Act was a tax imposed on persons engaged in business as distributors of cigarettes in this State.

In 1963 the Act was amended and declared that the impact or incidence of the tax is on the retailer; however, under the amended Act the distributor continues to have the responsibility of affixing the tax stamps to the cigarette packages and is required to add the tax to the price of the cigarettes sold. Under the amendment any distributor who fails to properly collect and pay the tax imposed is liable for the tax. Ill. Rev. Stat. 1965, ch. 120, par. 453.2.

Under the 1963 amendment the flat 5% discount rate granted the cigarette distributors under the 1941 Act as amended was discontinued and replaced with a graduated declining discount rate measured by the dollar amount of the taxes paid by the distributor in any year commencing July 1 and ending June 30 of the following year. (Ill. Rev. Stat. 1963, ch. 120, par. 453.2(b).) The discount rate schedule adopted in 1963 and its revisions in 1965 and 1967 are as follows:

1963 Amendent

First $700,000 of tax paid—5% discount
Second $700,000 of tax paid—4% discount
Third $700,000 of tax paid—3% discount
All additional tax paid—2% discount

1965 Amendment

First $700,000 of tax paid—2 6/7% discount
Second $700,000 of tax paid—2 2/7% discount
Third $700,000 of tax paid—1 5/7% discount
All additional tax paid—1 1/7% discount

1967 Amendment

First $700,000 of tax paid—2 2/9% discount
Second $700,000 of tax paid—1 7/9% discount
Third $700,000 of tax paid—1 1/3% discount
All additional tax paid—8/9% of 1% discount

The 1968 amendment continued the discount rate of the 1967 amendment. Section 2(b) of the Act in regard to the schedule of discounts states: "(b) The distributor shall be required to collect the taxes provided under paragraph (a) hereof, and, to cover the costs of such collection, shall be allowed a discount during any year * * * in accordance with the schedule set out * * *."

It is the graduated feature of the rate of discount which plaintiff claims discriminates against it as hereinafter indicated.

F. W. Koenecke and Sons, Inc. is a licensed distributor of cigarettes in Illinois. Its business is the import purchasing of cigarettes from the manufacturer and the selling of cigarettes to wholesalers and retailers, both inside and outside of this State. It is the largest distributor of cigarettes in the midwest. As a distributor, the statute imposes upon it the obligation of affixing to each package of cigarettes a revenue tax stamp before delivering them in this State to a purchaser.

Cigarettes purchased by plaintiff are shipped to its plant in standard cases. Each case contains 60 cartons with 10 packages of 20 cigarettes in each carton or a total of 600 packages of cigarettes in each case. Each case is opened, all 60 cartons are removed and opened, a tax stamp is affixed to each of the 600 packages, and the cartons are then

resealed and replaced in the case. Plaintiff has special machinery, equipment and personnel to perform this operation. The amended complaint alleges that plaintiff purchases approximately $700,000 of tax stamps a week which has the effect of placing plaintiff in the lowest discount bracket within the first month of the year's operation.

Although, since the amendment to the Act in 1963 the statute has specifically provided that the tax imposed thereunder is a tax imposed upon "any person engaged in the business as a *retailer* of cigarettes" (emphasis added), plaintiff as a premise of its constitutional argument insists that the Act still imposes an occupational tax upon distributors of cigarettes. The *Mutual Tobacco Co.* case which so held and which plaintiff cites in support of its position was decided prior to the 1963 amendment, at a time when the Act specifically provided that the tax imposed thereunder was a tax imposed upon any person engaged in the business as a *distributor* of cigarettes. Although the Act since the 1963 amendment has continued to look to the distributor for the collection of the tax, it has likewise provided since that date: "The impact of the tax levied by this Act is hereby declared to be imposed upon the retailer and shall be prepaid or pre-collected by the distributor for the purpose of convenience and facility only, and the amount of the tax shall be added to the price of the cigarettes sold by such distributor." (Ill. Rev. Stat. 1967, ch. 120, par. 453.2.) We think the language of the Act is clear. The tax is no longer an occupation tax imposed upon distributors of cigarettes but is an occupation tax imposed upon those engaged in business as retailers of cigarettes in this State. Since the statute specifically requires that the distributor pass the tax on to the retailer, no incidence of the tax falls upon the distributor and we are concerned not with the effect of the tax upon the distributor but with the effect of the discount which, as specifically stated in the

Act, is in the nature of compensation to the distributor to cover the costs of collecting the tax from the retailer.

Plaintiff contends that the graduated discount, decreasing as the amount of tax remitted by the distributor to the Department increases, has the same effect as a graduated tax on the distributors which increases with the volume of sales. Plaintiff then asserts that under the holding in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 79 L. Ed. 1054 and *Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U. S. 32, 81 L. Ed. 22, such a graduated tax must be held violative of the equal-protection clause of the fourteenth amendment. In these two cases the tax was based on a graduated percentage of the gross receipts or gross sales.

We do not consider either the *Stewart* case or the *Great Atlantic & Pacific Tea Co.* case to be helpful or in any way controlling in deciding the case now before us. Since the 1963 amendment to the Act as above stated the incidence of the tax is clearly on the retailer and not on the distributor. As Mr. Justice Roberts stated in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 78 L. Ed. 1141, at page 1148: "The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors, but make of them mere collectors," and at 1147, "Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement." (78 L. Ed. at 1148.) See also *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 1376, 68 L. Ed. 593; *International Harvester Co.* v. *Wisconsin Dept. of Taxation*, 322 U. S. 435, 88 L. Ed. 1373; 51 Am. Jur., Taxation, sec. 1277.

The plaintiff therefore was not a taxpayer subsequent to the 1963 amendment to the Act but was instead acting solely as an agent for the State in the collection and the remittance of the tax. Since we have determined that no tax is imposed on the distributors of cigarettes under the

provisions of section 2(b) of the Act, the graduated discount provision thereof cannot therefore violate section 1 of article IX of the Illinois constitution of 1870 (uniformity provision).

If plaintiff affixes revenue stamps with a face value of $100,000 to packages of cigarettes, it receives $100,000 when those packages of cigarettes are sold to a retailer. However, if, as alleged, plaintiff is in the lowest discount bracket, under the 1968 amendment it is entitled to a discount of 8 9 of 1%. The $100,000 worth of revenue stamps therefore do not cost the plaintiff $100,000 buf approximately $888.88 less than that amount. This sum represents compensation to the distributor, as stated in the Act "to cover the cost of such collection." There is no constitutional right to such compensation. Had the legislature seen fit it could have made no provision for compensation to the distributor to cover the cost of collecting the tax. *Sherman-Reynolds, Inc.* v. *Mahin*, 47 Ill. 2d 323.

Alternatively plaintiff argues that even if the State has no constitutional obligation to justly compensate the distributors for performing tax-collecting services, once the State decides to do so it cannot do so in such a way as to discriminate among members of the class performing the same services.

The legislative purpose in providing for compensation to distributors is to cover the cost of collecting the tax. It is apparent from the fact that four separate brackets are established that the legislature has made a determination that the cost of collecting the taxes decreases as the volume of sales of packages of cigarettes increases. The legislature has a wide discretion in classifying objects of its legislation and its exercise of that discretion will not be interfered with unless clearly in violation of some constitutional limitation. There is a presumption in favor of the validity of the classification and one who assails the same

has the burden of showing that the classifications are arbitrary. (*Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176, 80 L. Ed. 138; *People* v. *Saltis*, 328 Ill. 494.) In an attempt to overcome this presumption, plaintiff relies on the allegations of the amended complaint which it contends were admitted to be true by the defendant's motion to strike which the trial court granted. Concerning the question of costs the amended complaint alleges: "While the discount allowed plaintiff on its purchases of cigarette tax stamps under Section 2(b) of the Act is 'to cover the cost' of collecting the cigarette tax, included in such costs are the additional costs of stamping and other tangible expenditures necessarily incurred by plaintiff in connection therewith. The minimum discount allowed under each of said amendatory Acts is not sufficient to cover plaintiff's costs for collecting the cigarette tax, and said costs do not decrease with increased collections of said tax." It is the last sentence of these allegations which plaintiff insists discloses the arbitrary classification made by the legislature relative to costs. However, this sentence refers only to plaintiff's costs and makes no allegations as to the costs throughout the industry of collecting the taxes. As stated in *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 79 L. Ed. 259 at 262: "They do not tell us whether the appellant ran its business with reasonable efficiency when compared with others in its calling."

Assuming that the minimum discount rate is not sufficient to cover the costs for collecting cigarette tax by *all* distributors, this fact would not render the Act invalid. Under *Sherman-Reynolds, Inc.* the legislature is not required to grant any compensation for collecting the taxes. It would follow therefore that partial compensation for the costs of collecting the taxes would not be objectionable.

Again, assuming the allegation to be that costs generally (instead of plaintiff's costs) do not decrease with increased

collection of taxes, we do not consider this allegation to be a sufficient allegation of facts to rebut the presumption of constitutionality of the classification. As was stated in *Pacific States Box and Basket Company*: "The burden is not sustained by making allegations which are merely the general conclusions of law or fact * * *. Facts relied upon to rebut the presumption of constitutionality must be specifically set forth * * *. A motion to dismiss, like a demurrer, admits only facts well pleaded." (80 L. Ed. at 146.) A motion to dismiss does not admit conclusions of facts unsupported by specific allegations of fact upon which such conclusions rest. (*Pierce* v. *Carpentier*, 20 Ill. 2d 526; *Kurtzon* v. *Kurtzon*, 395 Ill. 73.) It may be that costs do not decrease with increased collection of taxes after a distributor reaches a certain volume of business or under certain circumstances, but the flat allegation that costs do not decrease with increased collections of taxes can only be taken as a conclusion of the pleader which is contrary to common experience and knowledge. Mr. Justice Cardozo stated in his dissenting opinion in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 79 L. Ed. 1054, at 1063: "Economically, the theory is that there is a minimum of size for business units below which efficiency is less on the average than expansion would tend to make it; that there are intermediate levels within which efficiency is subject on the average to progressive development; and that there is an ultimate level beyond which efficiency, even if promoted, goes forward more slowly and at a diminishing ratio."

The amended complaint alleges that the operation of affixing revenue stamps is "extremely costly in machinery, equipment and manpower." In line with Justice Cardozo's observation quoted above it would appear that if the costly machinery and equipment is operated at a capacity below its maximum efficiency, any increase in the number of revenue stamps affixed to cigarette packages by the use of this machinery and equipment would result in

a decreased cost per revenue stamp affixed. This is contrary to the general allegation of the plaintiff that "said costs do not decrease with increased collections of said tax." For these reasons we hold that the defendants' motion to dismiss does not admit the allegations of this conclusion stated in the amended complaint.

We find nothing in the admitted allegations of the amended complaint which overcomes the presumption of the validity of the classification for discount purposes which the legislature has made. The admitted allegations do not indicate that the classifications are arbitrary or capricious in violation of the equal-protection clause of the fourteenth amendment of the Federal constitution or the special legislation prohibition of section 22 of article IV of the Illinois constitution of 1870.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

State of Illinois
Office of
CLERK OF THE SUPREME COURT
Springfield
62706

November 24, 1971

Mr. Frank O. Wetmore
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No. 42544—Glenn R. Heyman, Trustee, etc., appellant, vs. George E. Mahin, Successor Director of the Department of Revenue of the State of Illinois, et al., appellees. Appeal, Circuit Court (Cook).

You are hereby notified that the Supreme Court today *denied* the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ JUSTIN TAFT
Clerk of the Supreme Court

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1072

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC.,

Petitioner,

vs.

GEORGE E. MAHIN, SUCCESSOR DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ET AL.,

Respondent.

BRIEF IN OPPOSITION

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Gray v. *Morgan*, 371 F. 172, cert den. 87 S. Ct. 1484, 386 U.S. 1033, 18 L. Ed 2d 596 13

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1072

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC.,

Petitioner,

vs.

GEORGE E. MAHIN, SUCCESSOR DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ET AL.,

Respondent.

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Cook County, Illinois, (unreported); the opinion of the Illinois Supreme Court, Docket No. 42544 reversing and remanding the judgment of the Circuit Court of Cook County (unreported), and the opinion of the Illinois Supreme Court upon rehearing, affirming the decision of the Circuit Court

of Cook County, reported at 49 Ill. 2d 284, 275 NE 2d 421, rehearing denied November 24, 1971, are all attached to the Petition for Writ of Certiorari filed by Petitioner, Glenn R. Heyman, Trustee in Bankruptcy of F. W. Koenecke & Sons, Inc.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ, except that such statement and the balance of the Petition show that the Petition raises no substantial question of federal law.

QUESTIONS PRESENTED

The question is whether the state-enacted graduated declining discount rate system of compensating cigarette distributors for affixing cigarette tax stamps under a State Tax Act raises any important question of federal law and whether such system is in any way violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are adequately set forth in the Petition for Writ of Certiorari filed herein.

ADDITIONAL STATEMENT OF CASE

Respondent is obliged to take issue with the purported facts as set forth in Petitioner's Statement of Case, which in the judgment of Respondent fail to clearly set forth those facts and are replete with conclusions. In other respects, the "Statement" is misleading.

To put this case in the proper context, we accept the first paragraph of the Statement of Case as it appears in the Petition for Writ of Certiorari. It is true that from 1941 to 1963 the discount to cigarette wholesalers was five percent (5%) regardless of the volume of a distributor's annual tax purchase, and that in 1963 the statute was amended by discontinuing the flat 5% discount granted to distributors on the purchase of tax stamps. The program was replaced with a graduated declining discount rate measured by the dollar amount of tax stamps purchased in any year. The schedule of discounts is correctly set forth in the footnote on page 7 of the Petition.

Petitioner states on page 7 of its Petition that "From the time of its enactment in 1963 to the summer of 1968, the graduated feature of the discount system was not enforced". This statement and the statement that follows are both factually incorrect and totally misleading. In 1968 the Department of Revenue became aware that F. W. Koenecke & Sons, Inc. was fraudulently making applications for distributor's licenses under names of various employees in order to qualify as distributors, which would then permit them to purchase cigarette tax stamps at the more favorable discount rate. In many instances the applications were filed in the names of part-time employees as wholesale cigarette distributors. Those employees testified under oath in Case No. 69B1647, U. S. District Court,

for the Northern District of Illinois, Eastern Division, that the signatures on those applications for license were forged. Those employees also testified that they never engaged in the business of selling cigarettes as wholesale distributors, never actually purchased cigarettes at cost from a manufacturer, never purchased any tax stamps from the State of Illinois, and never filed any tax returns as wholesale cigarette distributors. In several instances, long-time employees of Robert Koenecke (sole stockholder of Petitioner) were induced to sign the applications for license. They testified they were never given an explanation as to the nature of the forms they signed and the forms were not filled out at the time they signed them. In at least 10 of 12 instances the signatures were forged. By this method of setting up alleged multiple distributorships, Robert Koenecke was able to purchase for his company cigarette tax stamps on which he was able to receive the highest percentage of discount.

Upon learning of the possible fraud, the Department of Revenue thereupon issued an order which, in effect, denied to the fraudulent distributorships set up by Robert Koenecke the right to purchase tax stamps. Thereafter, a suit was filed by F. W. Koenecke & Sons, Inc. seeking a declaratory judgment as to the validity and constitutionality of the amendments to Section 2(b) of the Illinois Cigarette Tax Act (Ch. 120, Sec. 453½ et seq. Ill. Rev. Stat.) enacted in 1963.

In its complaint, F. W. Koenecke & Sons, Inc. alleged that it was the largest cigarette distributor in the Midwest and that the amendments to the Cigarette Tax Act "have had a materially adverse and devastating effect on plaintiff's business operations in that, predicated on a declining graduated discount, it is compelled to pay more

for the cigarette tax stamps it purchases from the State of Illinois than its smaller competitors. Plaintiff's purchases of approximately $700,000.00 in tax stamps per week would have the effect of placing it within 30 days of any year in the lowest discount bracket." (*See Pet. A7-8.)

The complaint further alleged that the amendments "had as their express purpose the intent to enact class legislation to the detriment of plaintiff and to the advantage of its competitors". And that the amendatory acts

> "will have the effect of converting said Act into a restrictive statute with the *avowed* purpose of placing plaintiff in the untenable position of being unable to compete with smaller cigarette distributors. . . ." (See Pet. A8.)

The trial court in its opinion stated:

> "The Court does not believe that the General Assembly would deliberately enact legislation specifically intended to injure plaintiff or provide an advantage to the competitor of the Plaintiff." (Pet. A19.)

Having all the facts, as set forth in Koenecke's amended complaint, before it, the Illinois Supreme Court nevertheless held that the only question before it was whether or not the amendment to the Cigarette Tax Act was constitutional. It held that the said amendments met the constitutional tests.

Subsequent to the filing of the amended complaint by Koenecke, an order was entered by the Circuit Court of Cook County directing the defendants in that case, including Respondent herein, to segregate and hold aside from the general fund of Illinois the difference (paid under protest by Koenecke), between the amount paid by Koenecke for the tax stamps at the lowest discount rate and the amount which it would have been charged with at the highest discount rate.

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* PET. A refers to the page of Appendix to Petitioner's petition for writ of certiorari.

Before the case could be determined, an involuntary petition in bankruptcy was filed against Koenecke and, thereafter, Petitioner sought and was given permission by the District Court to be substituted for Koenecke in the instant case. Thereafter the matter was heard by the Circuit Court of Cook County and was determined in favor of the defendants (including Respondent herein). Petitioner then appealed directly to the Illinois Supreme Court.

It is correct that on December 4, 1970, the Illinois Supreme Court reversed a judgment of the Circuit Court of Cook County and ordered the case remanded but, as will be shown hereafter, upon the filing of a Petition for Rehearing, the Supreme Court totally ignored the opinion rendered by Mr. Justice Crebbs (which was not published) and rendered its official opinion through Mr. Justice Ryan affirming the decision of the Circuit Court of Cook County. This opinion appears at 49 Ill. 2d 284, 275 NE2d 421, and in Petitioner's Appendix A. 1-2).

ARGUMENT

Respondent admits that the proceedings in the Illinois Supreme Court were highly unusual. We respectfully submit that after the filing of Justice Crebbs' opinion (which was not published) and upon the filing of the Petition for rehearing by Respondent, the Illinois Supreme Court quickly recognized that an erroneous interpretation of the law had been rendered over the signature of Justice Crebbs.

The Illinois Supreme Court, thereupon speaking through Mr. Justice Ryan, tactfully and mercifully ignored the opinion of Justice Crebbs and wrote its own opinion which set forth the correct interpretation of the law as it related to the Cigarette Tax Act. We believe that it is highly improper for Petitioner to even allude to the first opinion since it did not officially represent the position ultimately taken by the Illinois Supreme Court. A careful reading of the published opinion shows that the Illinois Supreme Court merely followed its uniform position in its previous utterances dealing with the Revenue Act of Illinois.

There are two conflicting arguments used by the Petitioner. The first is that as a result of the onerous provisions of the amendment, there would be a "destruction of Koenecke's business as a result of the enforcement of the graduated discount provisions". The second argument is that "the economic impact upon the person bearing the burden of the discriminatory provision is controlling".

As clearly set forth in the Illinois Supreme Court opinion, the impact of the tax is not upon the distributor but upon the ultimate consumer. As a matter of fact, the distributor receives, by legislative grace, compensation for his handling the cigarette tax stamps. As the opinion fur-

ther pointed out, under Illinois law which is controlling, the legislature is not obliged to compensate the distributor at all. The cost of handling the stamps and affixing them to packages of cigarettes is simply a part of the cost of doing business, just as the machinery, equipment, employees, etc. are part of the cost of doing business. All of these costs are reflected in the distributor's selling price to the retailer. The distributor has, therefore, no cause to complain as to the amount of discount gratuitously allowed him by the legislature.

Respondent suggests that, while F. W. Koenecke & Sons, Inc. had during the lifetime of Robert Koenecke's father and brother become the largest cigarette distributing agency in the Midwest and, presumably, a profitable one, it was not destroyed within a scant six months after Robert Koenecke became the sole stockholder simply because he was required to comply with the law. It was destroyed because his fraudulent practices became known to his creditors who filed an involuntary Petition in Bankruptcy. In any event Respondent further suggests that the honesty or dishonesty of Koenecke raises no important Federal question of law.

Respondent further suggests that at the time Justice Crebbs rendered his opinion in Petitioner's favor, the facts as subsequently appeared in the testimony in Case 69B1647 were not a matter of public record and were therefore, not available to the Illinois Supreme Court.

In its Petition on page 13, Petitioner submits that certiorari should be granted because the "economic impact" of the "tax" was upon Koenecke, who was obliged to bear the "burden" of the "discriminatory provision". The Illinois Supreme Court in its opinion disposed of this contention (Pet. A40) where it stated:

> "The impact of the tax levied by this Act (Cigarette Tax Act) is hereby declared to be imposed upon the retailer and shall be prepaid or pre-collected by the distributor for the purposes of convenience and facility only, and the amount of the tax shall be added to the price of the cigarettes sold by such distributor." (Ch. 120, Sec. 453.2, Ill. Rev. Stat. 1967)

The fact remains that Koenecke was wholly reimbursed for the cigarette tax stamps purchased by it by the retailers to whom the cigarettes were sold, as shown in Robert Koenecke's deposition taken on November 5, 1969 (excerpts from which deposition are attached as an Appendix hereto. See Res. A——).*

As the Illinois Supreme Court stated in its opinion (Pet. A41):

> ". . . Since the 1963 amendment to the Act as above stated the incidence of the tax is clearly on the retailer and not on the distributor. As Mr. Justice Roberts stated in *Monamotor Oil Co.* v. *Johnson*, 292 U.S. 86, 78 L. ed. 1141, at page 1148: 'The short answer to the contention is that the statutes properly construed lay no tax whatever upon the distributors, but make of them mere "collectors", and at 1147, "Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement." (78 L. Ed. at 1148). See also *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 1376, 68 L. Ed. 593; *International Harvester Co.* v. *Wisconsin Dept. of Taxation*, 322 U. S. 435, 88 L. Ed. 1373, 51 Am. Jr., Taxation, sec. 277.
>
> "The plaintiff therefore was not a taxpayer subsequent to the 1963 amendment to the Act but was instead acting solely as an agent for the State in the collection and the remittance of the tax. Since we have determined that no tax is imposed on the distributors of cigarettes under the provisions of section 2(b) of the

(* RES. A—— refers to respondent's appendix)

Act, the graduated discount provision thereof cannot therefore violate section 1 of article IX of the Illinois constitution of 1870 (uniformity provision)."

It is further contended by Petitioner that the Illinois Supreme Court erred in characterizing "an admitted allegation" as a "conclusion" because it had been treated as a fact by the parties and "by the Illinois Supreme Court in its first opinion". We deem it highly improper for the Petitioner to repeatedly refer to the unpublished "first opinion". It should require no citation of authority that a determination of a court of appeals is expressed only in its *published* opinions and that the decision reported at 49 Ill. 2d 484; 275 NE2d 421, rehearing denied 11/24/71, is the *only* official opinion.

We respectfully draw the Court's attention to the opinion of the Illinois Supreme Court (Pet. A43, 44) where the court carefully examined the contention, made in the Petition for Writ of Certiorari herein, that the state's motion to strike the complaint "admitted the facts of the complaint". In overruling that contention, the court cited the case of *Pacific States Box & Basket Co. v. S. T. White, et al.*; 80 L. Ed. 146, 296 U. S. 176, and repeated the oft-stated legal truism that "The burden is not sustained by making allegations which are merely the general conclusions of law or fact * * * Facts relied upon to rebut the presumption of constitutionality must be specifically set forth * * * A motion to dismiss * * * admits only facts well pleaded" and concluded that: "A motion to dismiss does not admit conclusions of facts unsupported by specific allegations of fact upon which such conclusions rest (citations)"

The Petitioner also contends that the Illinois legislature, contrary to the Equal Protection clause of the Four-

teenth Amendment, created a taxing system "so discriminatory and invidious as to force Petitioner into bankruptcy, while permitting its many low volume competitors to prosper". Surely, a motion to strike does not admit this to be a fact. This is obviously a conclusion. We take issue with the assertion by Petitioner that:

> ". . . the Illinois Supreme Court had no right on the record before it to disregard Petitioner's allegation forming the basis of the discrimination charge, namely that 'costs do not decrease with increased collections' and then in effect make a factual determination to the contrary. This determination is a most flagrant denial of petitioner's federal constitutional rights in view of the present undeniable fact, *prophesied in the amended complaint, that the original corporate plaintiff is now in bankruptcy*". (Petition, p. 16) (emphasis added)

This assertion is not warranted, as shown in Appendix hereto attached (see excerpts from depositions of Robert Koenecke and employees of F. W. Koenecke & Sons, Inc., Res. A—— et seq.) It was the fraud perpetrated upon the State which obliged the State to terminate the licenses of the pseudo-distributors set up by Koenecke and the unfavorable publicity that followed which undoubtedly led to the involuntary bankruptcy being instituted by the creditors of Koenecke, and not the action of the state legislature in enacting the amendment to the Cigarette Tax Act, nor the action of the Department of Revenue in carrying out that amendment.

We respectfully direct the attention of this Court to the opinion of the trial court (Pet. A20), where the court quoted the Illinois Supreme Court in *Mansfield* v. *Carpentier*, 6 Ill. 2d 455, 129 NE2d 166:

> ". . . . neither is the fact that a tax may put some individual out of business considered a valid argument

against the tax, if the tax otherwise is reasonable in relation to the cost. . . ."

In *Mutual Tobacco Co. v. Halpin*, 414 Ill. 226, 111 NE 2d 155, the court emphasized that:

". . . absolute equality is impractical in taxation and is not required by the Equal Protection clause of the constitution. . . ."

Even assuming for the purposes of this argument that the complained-of amendment to the Cigarette Tax Act which graduated the rates on a declining basis based on gross sales of tax stamps would, in fact, place Koenecke at a competitive disadvantage, there were no facts alleged to justify the assertion made in Koenecke's amended complaint that:

". . . the acts of the General assembly in its successive amendments . . . had as their *express* purpose the intention to enact class legislation to the detriment of plaintiff and to the advantage of its competitors." (Pet. A8) (Emphasis supplied)

Clearly, this is a conclusion.

We do not wish to burden this Court with a repetition of the arguments used here by Petitioner, nor to discuss the citations presented by it, since these same contentions and and citations were submitted to the Illinois Supreme Court and, as shown in its decision (Pet. A37-46), the Illinois Supreme Court carefully considered all the arguments and distinguished the cases cited by Petitioner.

Finally, we direct the attention of this Court to the assertion made by this Respondent initially, namely that no substantial federal question is here involved to justify certiorari. We respectfully direct this Court's attention to 28 U.S.C. 1341, which provides:

> "The district courts will not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state."

In the recent case of *Pintozzi v. Scott*, 436 F. 2d 375, it was alleged by appellant that substantial constitutional rights were denied by the state court as it related to the action of the state court in appointing a Receiver for the property of appellants arising from an action brought by the state for the collection of taxes. The court ruled that the action was barred by 28 U.S.C. 1341. Surely, if the Circuit Court of Appeals felt itself barred from interfering with a state court assessment, it would appear that no substantial federal question exists here to justify this Court assuming jurisdiction on a matter wholly concerned with state taxation. In fact, the question here is not even one of state taxation. It really involves the sole question of whether or how much a state is obliged to allow a distributor for performing a tax collection service. In this connection the Illinois Supreme Court held:

> "There is no constitutional right to such compensation. Had the legislature seen fit it could have made no provision for compensation to the distributor to cover the cost of collecting the tax." (*Sherman-Reynolds, Inc.* v. *Mahin*, 47 Ill. 2d 323, 265 NE2d 640)

We direct the attention of this court to the Illinois Supreme Court's reasoning as it appears in its opinion (Pet. A42). To the same effect as *Pintozzi*, *supra*, are the cases of *City of Houston* v. *Standard Triumph Motor Co., Inc.*, 347 F. 2d 194, cert. den. 86 S. Ct. 539, 382 U. S. 974, 15 L. ed. 2d 466; also to the same effect, *Gray* v. *Morgan*, 371 F. 2d 172, cert. den. 87 S. Ct. 1484, 386 U. S. 1033, 18 L. ed. 2d 596.

CONCLUSION

For the reasons above set forth, we respectfully request that the Court deny the Petition for Writ of Certiorari or, in the alternative, affirm the decision of the Illinois Supreme Court.

Respectfully submitted,

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Of Counsel.

APPENDIX

(From Examination of Robert F. Koenecke taken before Referee Schaefer on November 5, 1963)

33 A I don't remember, Mr. Makar.

Q I call your attention to paragraph appearing on the second column about close to the middle of the page, where it says, "'. . . less there be any further misunderstanding no package of cigarettes is sold by us without the State receiving its present tax of 9 cents per package of 20.'' Our gross cigarette tax is based on our cigarette purchases not sales.''

Do you recall that statement, sir?

A Yes.

Q Did you compose that statement?

A No.

Q Who composed it?

A Mr. Simon.

Q When you signed it, did you read that statement?

A Yes.

Q And at that time were the statements contained insofar as that portion of the statement that I just read to you, was that true?

A Yes.

Q So that on all of the cigarettes that were sold by either — to the wholesaler or the retailer, by your firm having tax stamps, you collected that face value of the
33a tax stamp from the wholesaler or the retailer, am I correct?

A Yes.

Q And that was true from the time of incorporation up until June 30, 1968, sir?

A Yes.

Q Sir, in 1958, when you incorporated, how many employees to the best of your knowledge, did you have at that time?

A I don't know.

Q Can you give us any estimate, or to the best of your knowledge, how many employees you had? Was it 50? Was it 100?

A I can't.

Q Did you have in excess of 200 employees?

A We never had 200.

Q Well, did you have more than 150?

A I don't know.

Q Sir, within your organization from the time of incorporating up until June 30, 1968, who had charge of hiring the employees that were employed by F. W. Koenecke & Sons?

A My brother at the time of his death, and after that it was Edward Klopp.

(From the Examination on July 17, 1969 of Robert E. Koenecke before Referee Elmer P. Schaefer in Case No. 69 B 1647)

63 or corporation, the nature of your relationship with other firm or corporation.

You indicated there you were president of F. W. Koenecke & Sons, Inc., 13136 South Western Avenue, Blue Island, Illinois.

A Yes.

Q Now those statements that you have just read — that I have just read to you beginning with questions and answers with No. 10 and ending with question and answer 11, those were true, is that right, sir?

A Yes.

Q Now with respect to the applications of the remaining individual licenses, I am sorry, applicants for licenses which are represented by these group documents, Exhibit A, did you talk to any of those individuals concerning the applications?

A Yes.

Q Did you talk to each one of them, sir, or to whom did you talk to?

A I got them in a group, and I said if we want to keep this volume we have to use your names for licenses.

Q When did you do that, sir?

64 A. When I first started.

Q When would that be, sir?

A That would be around 1962, when the law went in.

Q You mean in August, around there?

A Yes. I talked to them. I seen them every day, and I would say we are ready for another license, and I would say fellows, I am going to use your name.

Q Would you please examine these applications and tell us which of these applicants told you that you could use their name, sir?

A All of them did. I would say all of them did. That I asked. Some of my other people asked them.

Q I want to know, sir, which are the ones which you personally asked, and in which you personally received a response from the individual whose name appears on that application? Will you please examine these?

A I can't remember that.

Q To the best of your memory, could you give us by going through each one?

A I can't.

Q You cannot.

65 Sir, did you, at that time, explain to any of these individuals, whom you said you had gathered, that if they signed the applications and gave the answers that are listed, that they would not be telling the truth?

A I just asked them if I could use their name and have them sign them.

Q Did any of them indicate that they would do any business in their own individual capacity?

A No. No.

Q Did any of them indicate that they would have a business name?

A No.

Q Did any of them indicate to you that they would have a business banking account in any bank?

A No.

Q Did any of them indicate to you, sir, that they would lease any portion of the premises —

A No.

Q — where the business or the alleged business is to take place?

A No.

Q Did you advise them, at that time, as to what information you would put down on applications?

66 A No. I never filled out an application.

Q Well, these applications incidentally were made upon your direction, were they not?

A Yes.

Q You instituted or requested that they be made out, sir?

A Yes.

Q And the sole purpose of the applications was to obtain a license so that you would obtain a higher discount?

A Yes.

Q For F. W. Koenecke & Sons, Inc., is that correct?

A Yes, sir. Yes, sir.

Q And that was true from the period of July 1st, 1965 up to and including June 30, 1968?

A Right, yes.

Q Is the purpose of the bonds of each individual licensee for that main purpose —

MR. LEVIT: Objection, your Honor. He can't tell what the purpose of the bonds are. These are issued by the bonding companies of the licensees.

THE REFEREE: Do you want to rephrase that?

MR. MAKAR: Yes, your Honor.

72 bearing application No. 1304, would your answers be the same to each of those as your answer was to Fred Thomason, application bearing 1116?

A Yes, same answer.

Q Now, did you know John H. Buck, Mark P. Cowley, Guy DeLisa, James Hansen, William McKeon, Joseph

Shaugnessy, Eugene Sullivan, Helman Works to have also been policemen for the City of Chicago?

A I knew that.

Q At the time that they were working for you, sir?

A I knew that, I did.

Q Do you understand whether or not any of those individuals signed the particular application?

A I don't know.

Q Now, these applications were made out by whom, sir?

A Harry Rutnick was my attorney at the time. He made them out or somebody in his office.

Q Pardon?

A Or somebody in his office.

Q And that would be where, sir?

A 29 South LaSalle.

Q Did Mr. Rutnick or anyone from his office come
73 to your business address — by that, I mean the business address of E. W. Koenecke & Sons, at 13136 South Western Avenue, for the purpose of having any of these individuals sign any of these applications?

A No.

Q Do you know whether or not any of these individuals, other than yourself, ever went to Mr. Rutnick's office or any members of his firm to sign any applications?

A Not that I know of.

Q When would you decide that another application should be submitted to the State of Illinois in any individual's name for the purpose of securing a license, as a licensed distributor?

A I had a fellow upstairs that made out the requests, and he kept track of the $700,000. And he decided when we would apply for another license.

Q What was that man's name, sir?

A Fred Sonizer.

Q Was he the individual who kept a tabulation?

A Yes.

Q Of all of the stamp purchases from the time of July 1st, 1965 up to and including June 30, 1968?

A Yes.

78 Q And he would also put in the license all the information called for therein?

A Yes.

Q Now he would list under the name the individual bearing the license number and also the name of the business, am I correct?

A Right.

Q And he would list the address as the business address of that particular individual at 13136 South Western Avenue, Blue Island?

A Yes.

Q Now would he also indicate, sir, where it says, "Authorized by," and sign his name to that, sir?

A Yes.

Q As the purchasing agent of the individual licensee?

A Yes.

Q Who gave him instructions to sign on behalf of the individual licensees?

A They came out for years. Nobody. He just did it and he always seemed to be right.

Q Did any of the individual licensees, that is individual persons in whose names these licenses were procured, did they, at any time, authorize Mr. —

79 A No.

Q — Mr. Sonizer to sign as purchasing agent on their behalf?

A No.

Q Now after the cigarette tax stamp order was filled out and the names of the individual licensees or in the name of F. W. Koenecke & Sons Inc., whichever was used at the time by yourself and Mr. Sonizer, what would be done with that form, sir?

A Give it to him or express with a certified check and go pick up the stamps.

Q Whose check was that, sir?

A Koenecke Incorporated.

Q And would that form also contain the amount of the stamps purchased?

A Yes.

Q And would that form also contain the amount of the discount being taken —

A Yes.

Q — by the individual licensee?

A Yes.

Q And then the amount of the check would be the same amount as the net after the discount was taken, is that correct?

(From Deposition taken October 30, 1969 at the Office of the Attorney General)

(Witness sworn)

MR. MAKAR: Let the record show that this is a deposition being taken pursuant to the Bankruptcy Act and the Federal Rules of Court.

JOHN P LEEHY, called as a witness by the Department of Internal Revenue herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Makar:

Q Sir, would you please state your full name.

A It's John Patrick Leehy.

Q Would you please state your residence address.

A 10307 South Homan.

Q Is that Chicago, sir?

A That's Chicago.

Q How long have you resided there?

A Oh, several years.

Q Approximately?

A I think approximately since 1963.

Q How old are you, sir?

A I'm twenty-six years old.

Q What is your business or occupation?

A Chicago Police Officer.

Q What particular branch are you assigned to?

A I'm at the Kensington Station which is District 5.

Q How long have you been a police officer?

A Four years.

Q Sir, were you ever employed by a firm known as F. W. Koenecke and Sons, —

A Yes.

Q Incorporated?

A Yes, I was.

Q Where were they located?

A 131st and Western.

Q And when were you employed by them?

A Oh, exact dates, I couldn't give you, but it was last year — well, actually, I think I started in 1967 and worked through the winter of 1967 and 1968.

Q When did you terminate your employment with them?

A Oh, I think it was approximately in January or February, but I'm not real sure, you know, of the exact date.

MR. FREEMAN: Of 1969?

MR. HEYMAN: Of 1969 or 1968.

THE WITNESS: 1969.

MR. FREEMAN: Of this year?

THE WITNESS: I think it was right near the end of the year, or the beginning of the new year, you know.

MR. MAKAR: Q Well, then, you started in 1967; as far as you can remember?

THE WITNESS: A 1968.

Q You started in 1968. And when, what month, do you recall?

A If you are familiar with when it hit the newspapers,

when they had the, you know, the cigarette tax stamp — they were having — they had a scandal in the newspapers about that, that Koenecke was using, you know, starting to form a new company each time and were getting a tax rebate?

MR. HEYMAN: I hit the newspapers before the November election.

MR. MAKAR: Q That's when you quit?

THE WITNESS: A That's when I quit, I don't remember the exact date.

Q When did you start, sir, do you recall?

A Well, let's see, I worked for approximately five or six months.

Q You worked five or six months?

A Right.

Q And you quit right after the newspaper publicity came out concerning the operations of F. W. Koenecke and Sons, is that right?

(Whereupon, the Reporter marked said document as Department's Exhibit No. L-1303 for identification.)

MR. MAKAR: Q Mr. Leehy, I hand you a document which has now been marked as Department's Exhibit A-1303 for identification, and would you please examine the face of that document and also the reverse side, and I call your attention to a signature or a purported signature which appears on the reverse side of the document.

THE WITNESS: A Yes.

Q There is a written signature there of John P. Leehy, do you see that, sir?

A. Yes.

Q. I ask you, sir, is that your signature? In other words, did you sign it?

A. No, I did not.

Q. Did you authorize anyone to sign your name to that document?

A. No, I did not.

Q. Did you ever see that document prior to this date?

A. Yes, I did.

Q. When and where and under what circumstances did you see that document?

A. I saw it under the circumstances of being investigated by the I.I.D., which is the Internal, what you call it, Internal Investigation Division of the Police Department.

Q. When was that, sir?

A. Oh, let me see now. Well, it was several months after the scandal broke.

Q. Was that before or after you terminated your services with F. W. Koenecke and Sons, —

A. That was after.

Q. — Incorporated?

A. That was after.

Q. Did you, at any time, authorize anyone to give any information contained in that document under your name?

A. No, I did not.

Q. Now, I hand you, sir, documents which have been marked as Department's Exhibit Nos. T-1303-1, T-1303-2, and T-1303-3 for identification.

Have you examined those, sir?

A Yes, I have.

Q Had you ever seen those documents before I handed them to you?

A No, sir.

Q Did you ever write to Liggett and Meyers, or otherwise communicate to them concerning any shipments of cigarettes to you, sir?

A No, sir.

Q Did you ever write or otherwise communicate to the Brown and Williamson Tobacco Corporation about any shipments of any cigarettes to you?

A No, sir.

Q Did you ever contact Phillip Morris by writing, or otherwise--

A No.

Q --about shipping any cigarettes to you?

A No, sir.

Q Did you authorize anyone else to write on your behalf or communicate on your behalf to either of those three companies?

A No, I did not.

Q Sir, I hand you a document which has been identified or marked, rather, for identification as Department's Exhibit I-1303, purporting to be a license or copy of a license.

Did you ever see that document or any similar document, whether an original or duplicate of that, before I handed that document to you?

A No, I did not.

Q. Did you ever receive any type of a license from
the State of Illinois, or any other State to act as a
cigarette distributor?

No, I never did.

Did you ever apply at any time for a cigarette dis-
tors license?

No, sir.

I hand you a document, sir, which has now been
ed as Department's Exhibit No. B-1303 for identifica
and I call your attention to what appears to be a
n signature of John P. Leehy, appearing on the first
of that document, and that document purports to be
d, and I ask you, after your examination, is that your
ture appearing on that document?

That is not my signature.

Did you ever authorize anyone to sign your name
t document?

No, sir.

Have you ever seen that document prior to my hand-
to you?

No, I have not.

And that is of this date?

Correct.

Sir, I hand you two documents which have been
arked as Department's Exhibit Nos. B-1303-1 and
-1303-2 for identification, purporting to be returns
f cigarettes and I call and invite your attention to
ature which appears thereon on each of those docu-
of John P. Leehy or, I am sorry, of J. P. Leehy?

Yes.

Q Do you see that?

A Yes, I see it.

Q Is that your signature on either of those documents? s that your signature?

A It's not my signature.

Q Did you, at any time, authorize anyone to sign your nme to either of those documents?

A No, I never authorized anybody to.

MR. FREEMAN: Let me see those documents.

MR. MAKAR: Q Sir, did you, at any time, operate y business as a cigarette distributor?

THE WITNESS: A Is that the whole question?

Q Yes.

A No, I did not.

Q Did anyone, at any time, from F. W. Kosnicke and ns, Incorporated, ever inform you that they would pro- ire any type of a cigarette distributor's license or any her license in your name?

A No.

rom the Deposition taken October 30, 1969 at the Office of the Attorney General)

(Witness sworn)

MR. MAKAR: Let the record show that this is a deposition being taken pursuant to the Bankruptcy ct and the Federal Rules of Court.

HEODORE H. ULRICH, called as a witness by the Department of Internal Revenue herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Makar:

Q Would you please state your full name and residence address, sir?

A My name is Theodore H. Ulrich.

Q What is your residence address?

A 2459 New, N-e-w, Street.

MR. FREEMAN: What was the address again.

THE WITNESS: 2459 New Street.

MR. FREEMAN: N-e-w?

THE WITNESS: That's right.

MR. FREEMAN: Chicago?

THE WITNESS: No, Blue Island.

Mr. Makar:

Q How long have you lived there?

A All my life.

Q And how old are you?

A Oh, let's see. I'm forty-eight.

Q What is your business or occupation?

A Right now, truck driver.

Q Working for whom?

A Sibr — F. J. Sibr and Company, S-i-b-r, and Com-
ny.

Q Located where, sir?

A I believe it's 123rd and Laramie, Alsip, Illinois.

Q How long have you been working for them?

A Six months.

Q Sir, were you ever employed by F. W. Koeneke and Sons, Incorporated?

A Yes.

Q At what address?

A 13136 South Western Avenue, Blue Island.

Q When were you employed by them?

A When?

Q Yes.

A Well, I was employed for eleven years.

Q When did you begin, sir?

A Oh, that would be about 1958. April of 1958, I believe.

Q And you terminated your employment with them?

A Yes.

Q When?

to be a license or a copy of a license.

I also want you to mark, Mr. Reporter, another group of documents as Department's Exhibit Nos. P-1141-1 and mark them consecutively or consecutively number them until the end, and I believe the last one is 20.

Mr. Reporter, I want you to mark another group of documents as Department Exhibit Nos. R-1141-1, and mark them consecutively until the end, which, I believe, is 36.

(Whereupon, the Reporter marked said documents as Department's Exhibit Nos. S-1141, A-1141, T-1141-1, T-1141-2, T-1141-3, R-1141, L-1141, P-1141-1

through 1141-20 inclusive, and R-1141-1 through R-1141-36 inclusive for identification.)

Mr. Makar:

Q. Mr. Ulrich, I hand you a document which has been marked as Department Exhibit No. A-11, purporting to be an application, and there appears to be matters on the face and also on the reverse side, and I specifically invite your attention to the signature that appears on the reverse side where it says — there is a signature, and it says: "Ted Ulrich," and I ask you, sir, did you sign that?

A. No, sir.

Q. Did you authorize anyone to sign your name to that document?

A. No, sir.

MR. FREEMAN: May I see that, please.

Mr. Makar:

Q. Did you authorize anyone to make any application on your behalf for a cigarette distributor's license?

A. No, sir.

Q. Sir, I hand you three documents purporting to be letters which have now been marked as Department's Exhibit Nos. T-1141-1, T1141-2, and T-1141-3, respectively, and I ask you, sir, did you receive any of those documents at any time?

A. No, sir.

Q. Did you ever see those documents before I handed them to you?

A. No, sir.

Q Did you contact, or did you authorize anyone on your behalf to contact P. Lorillard and Company to make any shipment of cigarettes to you?

A No, sir.

2 (Deposition taken October 30, 1969 at the office of the Attorney General)

MR. MAKAR: Let the record show that this is a deposition being taken pursuant to the Bankruptcy Act and the Federal Rules of Court.

WILLIE ROBINSON, called as a witness by the Department of Internal Revenue herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MAKAR:

Q Would you please state your full name and residence address, sir?

A My name is Willie Robinson.

MR. FREEMAN: Willie?

THE WITNESS: Right, Willie.

MR. FREEMAN: William?

THE WITNESS: No, Willie, W-i-l-l-i-e, R-o-b-i-n-s-o-n.

MR. FREEMAN: Oh, this is Robinson. I thought it was Ulrich.

BY MR. MAKAR: Q What is your residence address?

A 6604 South Champlain.

Q Champlain?

A Yes.

Q Is that Chicao, sir?

A Yes.

Q How old are you, sir?

A Fifty-three.

Q What is your business or occupation?

A Well, I works for Libby, McNeill and Libby. That's my job.

Q How long have you been working for them?

A Fifteen years.

MR. FREEMAN: Fifty years?

THE WITNESS: No, fifteen.

MR. FREEMAN: Fifteen?

THE WITNESS: Fifteen, fifteen.

BY MR. MAKAR: Q Where are they located?

A 136th and Western.

Q What is your position with them?

A Fork truck driver.

Q What?

A Call it lift truck driver.

Q Lift truck driver?

A Right.

Q Were you ever employed by F. W. Koenecke and Sons, Incorporated?

A Right.

Q And at what location?

A At 131-something in Blue Island.

Q When did you work for them?

A As near as I can guess, it was around, oh, some time in December in 1965 that I started there, and I worked up until 1968, I think.

Well, I worked two years with them; two years.

Q You worked there two years?

A Two years. That's all.

Q This is 1969?

A This is 1969.

Q And last year was 1968?

A Right.

Q Now, were you working there last year, sir?

A No, I wasn't.

Q Then, you were working, or you left there in 1967, sir?

A Oh, let me see whether it was 1967 or the first part of—What year was it when they closed them plumb up? Was that last year?

Q When they closed what?

A Closed them up.

MR. FREEMAN: They closed them down in 1969.

MR. HEYMAN: March of 1969.

BY MR MAKAR: Q They closed them—Well, from what I gather, they ceased to do business this year.

A No, no.

Q How long has it been since you last worked for them?

A That was last year. Last year in February.

Q Of 1968?

A Of 1968.

Q I see. Now, what were your duties when you worked for F. W. Koenecke and Sons, Incorporated?

A Janitor.

Q What were your hours of employment?

A From 6:00 in the afternoon until a quarter to 11:00 at night.

Q That's 6:00 p.m. in the evening?

A Right.

Q Until a quarter after 11:00?

A A quarter to 11:00.

MR. FREEMAN: That's 10:45?

THE WITNESS: 10:45.

BY MR. MAKAR: Q Until 10:45. Was that every day, sir?

A Five days a week.

Q Was that a second job that you had?

A That was a second job, yes.

Q Did you, at any time, operate any type of a business in the sale of cigarettes, or, pardon me.

A No kind of business in my life; cigarettes or nothing else. No kind of business.

Q No kind of business?

A No kind.

MR. MAKAR: Will the Court Reporter please mark the following documents as Department's Exhibit Nos. A-1301 for identification, on the face and the reverse side, and another group of documents which I shall request to be marked as Department's Exhibit Nos. T-1301-1, which is the first document, and the second as T-1301-2, and the third document as T-1301-3, all Department Exhibits, and another document as Department Exhibit No. B-1301, consisting of two pages purporting to be a bond.

Then another document as Department's Exhibit No. L-1301; another group of documents which are to be marked as Department's Exhibit Nos. P-1301-1, the second document P-1301-2 the third document P-1301-3, and the fourth document P-1301-4. That's group exhibit P.

(Whereupon, the Reporter marked said documents as Department's Exhibit Nos. A-1301, T-1301-1, T-1301-2, T-1301-3, B-1301, L-1301, P-1301-1, P-1301-2, P-1301-3 and P-1301-4 for identification.)

Q—that were to be brought in.

Do you have any of those documents with you?

A I don't have any kind of documents.

Q Now, sir, I hand you this document which has been identified and marked as Department's Exhibit No. A-1301, on the face and on the reverse side, and I call your attention, particularly to the reverse side of that document where there appears to be a signature of Willie Robinson.

I ask you, sir, after you have examined that document, did you sign that document?

A No, sir, I didn't.

Q Did you, at any time authorize anyone to sign your name to that document?

A No, sir.

MR. LEVIT: Let the record show that the witness was shaking his head from the start of the question before he even heard the end of it.

BY MR. MAKAR: Q Did you ever see this document before, sir?

A I never saw it.

Q Other than when I just handed it to you.

A No, sir, I did not. I never saw it.

Q Did you authorized anyone to make any application for a cigarette distributor license in your name?

A No, sir.

Q Sir, I hand you a group of documents which have been marked as Department's Exhibit Nos. T.1301-1, T-1301-2, and T-1301-3, and I ask you to examine those and tell us if you ever saw those documents before?

A No, sir.

Q Sir?

A No, sir.

Q Did you ever contact or authorize anyone to contact on your behalf Liggett and Meyers Tobacco Company concerning the shipment of any cigarettes to you?

A No, sir.

Q Sir, did you contact in any manner or authorize anyone to contact on your behalf the Brown and Williamson Tobacco Company concerning the shipment of any cigarettes to you?

A No, sir.

Q Did you or anyone on your behalf whom you authorized to contact the Phillip Morris Company—

A No, sir.

Q —concerning the shipments of any cigarettes to you?

A No, sir.

Q Sir, I hand you a document which has been marked as

12 Q Did you ever apply to the State of Illinois or any other place for a cigarette distributor's license?

A No, sir.

Q Did you authorize anyone to apply on your behalf for a cigarette distributor's license?

A No, sir.

Q Did you ever see this document which I have just identified for you?

A No, sir, never saw it.

Q Did you ever see any similar type of document bearing your name?

A No, sir.

Q Sir, I hand you a group of documents which have now been marked as Department's Exhibit Nos. P-1301-1, P-1301-2, P-1301-3 and P-1301-4 for identification, and I ask you, sir, whether or not you ever saw those documents?

A I have not.

Q Did you, at any time, purchase any tax stamps?

A No, sir.

Q Pardon?

A No, sir.

Q Did you authorize anyone to purchase any tax stamps on your behalf?

A No, sir.

13 Q Sir, I hand you a group of documents which have now been marked Department's Exhibit Nos. R-1301-1 and R-1301-2, together with Schedule CB and invoice

number B14843, and also Schedule CF and I call your attention to a signature which appears on each of the said exhibits where it says, "Signature" and there appears to be the name written, "W. Robinson."

Do you see that, sir?

A Yes, sir.

Q I ask you, sir, did you sign those documents?

A No, sir.

Q Did you authorize anyone to sign those documents on your behalf?

A No.

Q Did you ever file any type of returns with the State of Illinois or anyone else concerning cigarettes, or the sale of cigarettes, or tax stamp purchases, or the fixation of any tax stamps on any cigarettes?

A No, sir.

Q Did you authorize anyone to file on your behalf

A No, sir.

Q —any of those documents?

Q No, sir.

Q Sir, did anyone from F. W. Koenecke and Sons, Incorporated, at any time talk to you about the use of your name—

A No, sir.

Q —for doing, or authorizing, or transacting any type of a business?

A No, sir.

MR. LEVIT: Let the record again show that this witness answered the questions before they were ever completed by counsel.

BY MR. MAKAR: Q Do you understand the question fully, sir?

A Yes.

Q Is that the same answer?

A Yes, sir.

Q Thank you.

A It's the same answer.

MR. MAKAR: Thank you, sir. I have no further questions, sir.

MR. FREEMAN: I want to ask him a question.

Cross Examination

BY MR. FREEMAN:

Q Now, you testified that your signature does not appear on those documents, nor did you ever authorize anybody to sign that for you.

2 (Deposition November 7, 1969 at Office of Attorney General)

FREDERICK B. ZAHNISER, called as a witness herein, having been first duly sworn, was examined and testified as follows:

Examination

BY MR. MAKAR:

Q Sir, would you please give us your full name?

A Frederick B. Zahniser, Z-a-h-n-i-s-e-r.

Q What is your residence address?

A 2581 York Street, Blue Island.

Q What is your business or occupation?

A I am an employee of the High School District Number 218 now.

Q What do you do for them?

A My duties are varied. I deliver things for them, take pictures for them, I.D. pictures.

Q Where is the place you report for work?

A 127th, and Sacramento Avenue, Blue Island.

Q And is that the name of a particular school?

A D. D. Eisenhower.

Q High School?

A Yes, designated as Campus One, because there are six schools in the complex.

Q Sir, were you ever employed by F. W. Koenecke & Sons, Inc.?

A I believe it was around 1959 or '60.

Q And you continued in that position until you terminated your employment?

A Until the end, right.

Q In connection with your employment, sir, did you also operate any type of a business?

A I was one of the license holders for stamping.

Q Well, you were a license holder, but did you operate any business, sir?

A Not as such, no.

Q Did you receive any consideration of any kind for having your name on a license?

A No.

Q Sir, there was a subpoena served upon you for this deposition, was there not?

A Yes.

Q May I see your copy?

A Yes.

MR. MAKAR: Mark this S-1099.

(Document marked as requested.)

BY MR. MAKAR:

Q Sir, I show you this document marked as Department's Group Exhibit S-1099. Attached to this exhibit is a two-page document, marked Exhibit A, which contains a list of documents. Have you examined that list marked Exhibit A?

A I did.

Q Do you have any of those records?

A I have none.

Q Did you ever have any of those records?

A No.

Q Did you ever operate a business under the name of Frederick Tobacco Distributing Company?

A The business was operated, but I didn't operate it.

Q When you say the business was operated—

A That means there was business done under that license, but I was not operator of the business actually.

Q What was the business that was done under that license?

A The selling and delivering of cigarettes and tobacco products; also, probably, some candy was sold, if the customers ordered it, and drug sundries and such.

Q Who operated that business under that name?

A That was operated by the Koenecke firm.

Q Now, in connection with the selling and delivery of cigarettes, did that operation entail the keeping of records?

A Not on my part.

7 A Well, the orders were coming in and being processed by the Koenecke firm.

Q Well, did any orders for the sale of cigarettes come to Frederick Tobacco Distributing Company?

A Not to my knowledge.

Q Now, where did Frederick Tobacco Distributing Company purchase its cigarettes?

A They were purchased from the manufacturer, in various parts of the country, wherever their factories were, Louisville, Winston Salem, Greensboro.

Q What companies were used to purchase cigarettes in the name of Frederick Tobacco Distributing Company?

A American Tobacco Company, Liggett & Meyers, Lorillard, Philip Morris, Reynolds, Brown & Williamson.

Q Did you actually see invoices from these manufacturers for the sale of cigarettes to Frederick Tobacco Distributing Company?

A I don't believe the invoices were made out to Frederick Tobacco Distributors.

Q To whom were they made out, sir?

A To F. W. Koenecke & Sons, Inc.

Q How did cigarettes from F. W. Koenecke & Sons, Inc.—I'm sorry, strike that.

You say there were purchases of tax stamps in

(Deposition taken November 7, 1969 at Office of Attorney General)

EDWARD A. KLOPP, called as a witness herein, having been first duly sworn, was examined and testified as follows:

Examination

BY MR. MAKAR:

Q Sir, would you please state your name?

A Edward A. Klopp.

Q Where do you reside?

A 2359 South May, Chicago, Illinois.

Q Sir, what is your business or occupation?

A Salesman.

Q And by whom are you employed?

A Whitehall Products.

Q Where are they located?

A Wheeling, West Virginia.

Q Where do you work from?

A Home.

Q How long have you been employed by them?

A About the 12th of April, 1969.

Q Immediately prior to that, where were you employed?

A F. W. Koenecke & Sons, 13136 South Western Avenue, Blue Island, Illinois.

Q When did you first start working for them? 11 to do business as a cigarette distributor?

A His only indication was that he needed names, and he asked me for my name and my proper address, and he asked me which bank I banked in.

Q Is that all that was said, sir?

A Yes. Then, he wrote this information down.

Q Did he write it on the application?

A No, he wrote it on a piece of paper he had on his desk.

Q At the time you signed either of those two documents you have in your hand, being A-1095 and B-1095, was any information contained in those documents, or were those documents in blank?

A They were blank.

Q In other words, there was the typewritten material and that was all?

A Yes, the form itself.

Q You mean the printed form?

A The printed form, yes.

Q There was nothing typewritten in there?

A No, sir.

Q There was nothing written in there?

A No, sir, because I know I would have read these listed companies and that is the first time I saw this

16 (From Examination of Robert F. Koenecke before Referee Schaefer on November 12, 1969 in Case No. 69B1647 and 69B3596)

A I never saw any, but I imagine Cianci did. He took care of all of it. I never made out a cigarette report. I imagine he did, but I was never up in the office.

Q Isn't it a fact, sir, that Mr. Zahniser took care of the cigarette stamp purchases that were made in the State of Illinois?

A Yes, he made out the requests.

Q Now, would he inform you that a certain license would reach the $700,000 limit insofar as purchase of cigarette tax stamps were concerned?

A For me?

Q Yes.

A No, I would ask him.

Q And what would you do after you asked him?

A I would say, "We will have to get another license."

Q And then would you proceed to select the name to get another license?

A Yes.

Q Did you then proceed to assemble all of the documents that were necessary to procure that license?

A Documents were needed with three letters from 17 three loading manufacturers.

Q There was also a bond.

A A bond.

Q And an application. Am I correct?

A Yes.

Q Now did you secure all of these, or were they secured under your direction?

A Under my direction.

Q They were all secured under your direction, sir?

A Yes.

Q Now, as I understand all of these cigarette tax stamps that were purchased, individual licensees names,

were all paid by the F. W. Koenecke & Sons check, am I correct?

A Yes.

Q At what bank was that check drawn?

A First National Bank of Blue Island.

Q Did you at any time have any other banking account upon which checks were drawn?

A Harris Trust.

Q That is Harris Trust & Savings Bank of Chicago, sir?

A Yes.

THE REFEREE: Any other?

THE WITNESS: No.

THE REFEREE: She may have been on some of those though, I suppose.

THE WITNESS: No, I don't think so.

THE REFEREE: All right you can go ahead.

BY MR. MAKAR:

Q Mr. Koenecke, would you please tell us in which banks were the corporate accounts, and in which banks were the savings and loans or other institutions were your own personal accounts?

A First National Bank of Blue Island and Gary-Wheaton were corporate accounts; Home Federal, Chicago Heights were corporate moneys like C.D.'s; Harris Bank was corporate money; Harvey Savings & Loan was my money; Merrill Lynch stock transactions was my money; and, I think Continental Bank was my money—no, Continental Bank was corporate.

Q How about Chicago Heights Savings & Loan?

A Corporate.

Q And Home Federal was personal?

A Corporate.

Q Going back to the original question, sir, and that is: When purchases of tax stamps were made during the period of January 1963, to and including

26 Sons, Inc. went out of business where were those checks?

A Stored in our basement.

MR. LEVIT: Your Honor, may we merely make this statement: At the time Mr. Heyman took possession there were voluminous records, including boxes and canceled checks on the premises—

MR. HEYMAN: 144 cartons.

MR. LEVIT: We do not know whether those cartons contained the canceled checks, but presumably they could be found if anyone wanted to search those records.

MR. MAKAR: Thank you.

BY MR. MAKAR:

Q Sir, with respect to the purchase of cigarettes, did any of the individual licensees that had the licenses at your place of business, did any of them purchase any cigarettes?

A No.

Q Were any cigarettes purchased by F. W. Koenecke & Sons under their name?

A Yes. Oh, no. Not cigarettes, no.

Q There were no cigarettes purchased under the individual licensee's name then?

(From Deposition taken November 14, 1969 at Office of Attorney General)

MR. MAKAR: Would you have the record show that this is a deposition taken pursuant to the provisions of the Bankruptcy Act of the United States and also of the Federal Rules of Civil Procedure.

RICHARD CREACH, called as a witness herein, having been first duly sworn, was examined and testified as follows:

Examination

BY MR. MAKAR:

Q Sir, would you please state your name?

A Richard Creach.

Q What is your residence address?

A 14910 Seeley.

Q Is that South Seeley?

A Yes, because it's in Harvey.

Q Harvey, Illinois?

A Right.

Q What is your business or occupation?

A Now? At the present time?

Q Yes.

A I'm a timekeeper for Wyman Gordon.

Q How do you spell that?

W-y-m-a-n Gordon.

Q G-o-r-d-o-n?

A Right.

Q How long have you been with them?

A Seven months now.

Q Where are you employed? That is, the address.

A 147th and Wood Street.

Q Is it on 147th or Wood?

A Well, it starts on 147th. Yes, it's on 147th and Wood and runs back, you know. It's a big place.

Q That's also in Harvey?

A Right.

Q Immediately before that, where were you employed, sir?

A Well, I was with Koenecke then.

Q Is this F. W. Koenecke & Sons, Inc.?

A Yes.

Q What was their address?

A 13136 South Western.

Q In Blue Island?

A Blue Island.

Q How long were you employed by F. W. Koenecke & Sons?

A Fifteen years.

Q What is the last position you held with them?

A Bookkeeper.

Q Koenecke & Sons, Inc., were you employed anywhere else?

A No.

Q Did you have any type of business of any kind that you were operating yourself?

A No.

Q Sir, I hand you a document which has been marked as Department's Group Exhibit A-1103 for identification, purporting to be an application, with certain matters on the face and also on the reverse side thereof, and I invite your attention to a signature that appears on the reverse side of this exhibit. Do you see where it says, "Richard Creach"?

A Right.

Q Would you please examine that, sir?

I ask you, sir, did you sign that document?

A Right.

Q That is your signature?

A Yes, that is my signature.

Q All right, sir. Now, sir, would you please examine this document and, to the best of your recollection, tell us under what circumstances you signed that document?

A Well, Robert Koenecke, the owner, he wanted to use my name to purchase a cigarette license to buy cigarette stamps and—well, me and others, you know, had to sign this so he could purchase cigarettes. He had—I don' know how many licenses he had, but quite a few of them, you know.

Q First of all, sir, would you please tell us when you signed that application?

A Oh, I can't give you the date. I don't even know. I can't tell you the day or the date.

Q At that time, were you working as a bookkeeper, sir?

A No. I was checking bills and auditing bills, cigarette invoices rather.

Q I see. You had not yet become a bookkeeper?

A No.

Q Were you working in the office portion?

A Right.

Q Would that be up on the second floor of the plant?

A Second floor, right.

Q And at that time, who else was working in that office?

A Well, there was starting from the front office, there was Mrs. Koenecke—

Q That's Imogene Koenecke?

A Right. Sidney Beckman, Nick Cianci, myself,

2 (Deposition of Richard Creach taken November 14, 1969 at the Office of the Attorney General).

MR. MAKAR: Would you have the record show that this is a deposition taken pursuant to the provisions of the Bankruptcy Act of the United States and also of the Federal Rules of Civil Procedure.

RICHARD CREACH, called as a witness herein, having been first duly sworn, was examined and testified as follows:

Examination

BY MR. MAKAR:

Q Sir, would you please state your name?

A Richard Creach.

Q What is your residence address?

A 14910 Seeley.

Q Is that South Seeley?

A Yes, because it's in Harvey.

Q Harvey, Illinois?

A Right.

Q What is your business or occupation?

A Now? At the present time?

Q Yes.

A I'm a timekeeper for Wyman Gordon.

Q How do you spell that?

A W-y-m-a-n Gordon.

Q G-o-r-d-o-n?

6 Koenecke & Sons, Inc., were you employed anywhere else?

A No.

Q Did you have any type of business of any kind that you were operating yourself?

A No.

Q Sir, I hand you a document which has been marked as Department's Group Exhibit A-1103 for identification, purporting to be an application, with certain matters on the face and also on the reverse side thereof, and I invite your attention to a signature that appears on the reverse side of this exhibit. Do you see where it says, "Richard Creach"?

A Right.

Q Would you please examine that, sir?

I ask you, sir, did you sign that document?

A Right.

Q That is your signature?

A Yes, that is my signature.

Q. All right, sir. Now, sir, would you please examine this document and, to the best of your recollection, tell up under what circumstances you signed that document?

A Well, Robert Koenecke, the owner, he wanted to use my name to purchase a cigarette license to buy

9 Q And he did not make any announcement, or did he, "I want to use all of your names," or anything like that?

A No.

Q Was there any period of time, that you know of, in which there was a meeting, in which Mr. Robert Koenecke asked any or all employees to use their names?

A No.

Q Now, sir, to the best of your recollection, at the time that Mr. Robert Koenecke requested using your name, were there any other licenses of other employees in effect at the time, to your knowledge?

A I suppose so. I think so. I think there was.

Q Did you ever see any?

A No.

Q Did anyone talk to you or tell you that they had other licenses?

A No, not at the time. No.

Q Now, sir, when Mr. Robert Koenecke approached you, to the best of your recollection tell us what he said and what you said.

A Well, he told me that he wanted to use my name to purchase, you know, stamps for the cigarettes, you know, and he told me—let's see. I can't remember

10 now how many licenses he had to have.

Q Did he tell you that he had any licenses?

A Well, no. He said that he had to get some more, you know, to buy cigarette stamps, to get the discount, see, for the cigarette stamps.

Q And by that, you assumed he had other licenses?

A Right.

Q And is this the basis upon which you said he had other licenses?

A Right.

Q All right. Now, would you continue to tell us what he said to the best of your recollection?

A Well, this was about the extent of it. He said he had to, you know, have—he asked me could he use my name as a dummy company, you know, to purchase cigarette stamps so he could get the discount.

Q Did he offer you any money for the use of your name?

A No, none whatsoever.

Q Did you ask him for any money?

A No.

Q Or other consideration for the use of your name?

A No.

Q Did he say anything to you that if you did not permit your name to be used that he would go out of business, or anything of that nature?

A No.

Q Or that he would lose business?

A No.

Q And what was your response to that, sir?

A Well, I told him, "Yes." I gave him permission to use my name.

Q Now, sir, did he at that time have this application, which has been marked as Department's Group Exhibit A-1103 for identification?

A No, not at that time. That came later, you know.

Q How much later, sir?

A Oh, I would say roughly a month.

Q Very well. And, in the meantime, was there any further conversation about the use of your name?

A No.

Q By anyone?

A No.

Q Now, sir—then approximately a month later, he came to you with this application?

A Yes.

14 A Oh, no.

Q Did you at that time intend to be engaged in the business as a distributor of cigarettes in any other state?

A No.

Q Did you intend at that time to be engaged in any business whatsoever?

A Oh, no.

Q Did you at that time notice that, where it says:

"Name of applicant: Richard Creach, d/b/a—"

Indicating "doing business as"—

"Richard Tobacco Distributing Company"?

A No.

Q Or any other?

A No.

Q And Item Four, where it says:

"Business name and address, Richard Tobacco Distributing Company, at 13136 South Western Avenue, Blue Island."

did you intend to have a business name and address at that address or any place else?

A No.

Q Now, sir, I call your attention to Item Eight appearing on this form, where it says:

"With whom do you do your banking business?"

And the typewritten matter is:

"First National Bank of Harvey, Harvey, Illinois."

Now, I ask you, sir, did you at that time intend to do any banking business either at that bank or any other bank?

A Well, actually, no. This is where I have my checking account, that's why that is down.

Q That was your own personal account?

A Yes.

Q That was not a business checking account?

A No.

Q All right. Now, in Item Nine, where it says:

"Do you own or lease premises in which business is located?"

And the typewritten portion is:

"Lease."

Did you at that time intend to lease any premises?

A No.

Q At either 13136 South Western Avenue, Blue Island, or any other place for any business?

A No.

Q In Item Fourteen, where it asks:

"How long have you been engaged in the sale of cigarettes or other tobacco products?"

And it's typewritten in there:

"New business."

Now, you never intended at that time to have any new business, did you?

A No.

Q And then, in Fifteen, Item Fifteen of this same application:

"From what source do you intend to buy cigarettes?"

And you answered:

"Manufacturers."

Did you intend to buy any cigarettes from any sources for the business of transacting a distributor business?

A No.

17 Q The only cigarettes you may have intended to purchase would be just common, ordinary cigarettes that every consumer purchases?

A Right.

Q To smoke yourself?

A Yes.

Q But you were not intending to buy those from any manufacturers, were you?

A Oh, no.

Q And then, it says:

"If direct from manufacturers, list below the names and addresses of such manufacturers."

A And it says "Lorillard,"—

Q You saw those names?

A —"Liggett & Meyers, Phillip Morris."

Q Did you intend to buy any cigarettes from any of those manufacturers?

A No.

Q Sir, did you also note this, where it says, after the question and answer of Sixteen:

"Important."

Would you read that for the record?

A "Falsification of any of the

19 A No.

Q Did Mr. Sidney Beckman sign this application in your presence, where it says:

"Notary Public."

A No, he didn't.

Q Did you at any time appear before Sidney Beckman, who is shown to be a notary public herein, and ask him to notarize it?

A No, I didn't ask him to notarize it. No, that came from Bob.

Q Did you see Bob doing that?

A No.

Q Did Mr. Robert Koenecke ever mention to you that this application would be under oath?

A No.

Q Did he ever mention to you that he would have it notarized?

A Well, I knew it had to be notarized. I knew this myself.

Q How did you know that, sir?

A Well, in order to buy the cigarette stamps, you know, because I think one of these applications was sent to the cigarette companies. Now, this is my thinking. I think one of these applications was sent into the Department of Revenue before they could get permission to buy stamps.

Q Did they tell you that before you signed the application or did they tell you that after you signed the applicaion, or did they tell you before and after you signed this application?

A I can't remember now. You are talking about years past.

Q I see. Did you know at that time that there had to be letters from cigarette companies indicating that they would be willing to sell you some cigarettes?

A At the time I signed this?

Q Yes.

A No, to be truthful with you.

Q Now, I hand you a group of documents which have been marked as Department's Group Exhibit T-1103-1, 2 and 3 for identification, and I ask you, sir: Did you ever see those letters at any time before I handed them to you?

A No.

Q Did you know that anyone was going to contact any of these companies to get these letters indicating that they would sell you some cigarettes?

A No, I didn't know that.

Q Did you give anyone any permission to contact any of these companies to secure those letters?

A No.

Q Sir, I hand you aother document which has been marked as Department's Group Exhibit B-1103, purporting to be a bond, and I call your attention to a signature appearing about the middle of the face of this bond.

A Yes.

Q I ask you, sir, is that your signature?

A That's right.

Q Now, under what circumstances did you sign that document?

A Well, this is insurance. This would be signed for the company, you know, doing business as Richard Tobacco Distributing Company. You had to have a bond for the company, you know, cigarette company insurance. This is why I had to sign that, you know.

Q Who asked you to sign it?

A Bob.

Q Bob Koenecke?

A Right.

Q And was it at the same time that you signed the application?

A I think it was, yes.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1072

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC.,

Petitioner,

vs.

GEORGE E. MAHIN, SUCCESSOR DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ET AL.,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

The burden of petitioner's complaint is that the graduated discount provision of the Illinois Cigarette Tax Act discriminated against the bankrupt (predecessor of petitioner) in particular and others who might be in its circumstances. Whether the graduated discounts be called a tax or a system of compensation, the effect was to require of the bankrupt the payment of a higher price for cigarette tax stamps affixed to packages of cigarettes sold by it than the price charged for similar stamps sold to others, the distinction being based solely upon the bankrupt's larger volume of purchases.

Respondents argue (page 8) that petitioner has no cause to complain as to the amount of discount gratuitously allowed, because the legislature has no obligation to allow *any* discount. Petitioner does not quarrel with the latter statement, but insists that when a discount is allowed, it may not be on a discriminatory basis as is the case here. The discontinuation of all discounts would affect all distributors alike. The present graduated system does not; it discriminates against larger volume distributors.

Respondents devote a substantial portion of their Brief in Opposition (and appendix thereto) to quotations from which they argue that Robert Koenecke was a scoundrel. At page 8 of its Brief, respondents then state that the honesty or dishonesty of Koenecke raises no important Federal question of law. We could not be more in agreement with the latter assertion. Aside from the fact that the United States Supreme Court is hardly the forum in which to initially introduce transcripts of evidence in other proceedings, it should be borne in mind that the original decision in favor of respondents in the Circuit Court of Cook County, Illinois, was on a motion to strike* which takes as admitted for the purposes of that motion all factual allegations well pleaded.

Further, assuming for the purposes of argument, that Mr. Koenecke was as evil as is argued by respondents, the fact that he apparently avoided the enforcement of the graduated discount provision, by whatever means, for a period of five or six years does not have any bearing on the question of whether the enactment itself, when enforced in accordance with its terms, is or is not a violation of the constitutional safeguards contained in the Fourteenth Amendment to the United States Constitution insuring the equal protection of the laws.

* (Notwithstanding the implication at page 6 of respondents' Brief In Opposition that this case was tried in the Circuit Court.)

Apparently respondents' argument is that Koenecke is such a bad man that he should not be permitted to recover the taxes paid under protest whether or not the statute is constitutional. However, petitioner is the trustee in bankruptcy of F. W. Koenecke & Sons, Inc. and as such prosecutes this litigation on behalf of the creditors of that bankrupt. It does not do so on behalf of Koenecke.

Respondents seek here to argue many issues of fact on which they were apparently unwilling to permit petitioner to have a hearing in the Circuit Court of Cook County, Illinois. They have persisted in their arguments through the proceedings in the Supreme Court of Illinois which resulted both in the Crebs opinion of November 9, 1970 and ultimately what respondents term the "official" opinion rendered by Mr. Justice Ryan on September 13, 1971. Contrary to what might be implied from respondents' suggestion that "the Illinois Supreme Court thereupon speaking through Mr. Justice Ryan, tactfully and mercifully ignored the opinion of Mr. Justice Crebs and wrote its own opinion," the Crebs opinion did not result from a rump session of the Illinois Supreme Court. At the time Mr. Justice Crebs rendered the Court's opinion, he was a full-fledged member of that Court. What is intended by respondents in referring to the Ryan opinion as the Court's "*own*" opinion is not known. But it is plain that but for the filing by respondents of a petition for rehearing and its subsequent reversal, the Crebs opinion would have been published as the "official" opinion of the Supreme Court of Illinois and was at the time of its rendition the official act of that Court.

The Ryan opinion of the Supreme Court of Illinois has resulted in the denial to petitioner of an opportunity to be heard upon a claim of denial and violation of petitioner's rights under the Fourteenth Amendment to the United States Constitution. To do so the Supreme Court of Illi-

nois rules that the allegation of paragraph 14 of petitioner's Amended Complaint relating to the costs of applying cigarette tax stamps (for which the discount is allowed as compensation pursuant to the terms of the statute) that "said costs do not decrease with increased collections of said tax" is not an allegation of fact but is a mere conclusion. The mere designation of these factual allegations as conclusions does not resolve that issue. Even if the allegations were properly characterized as conclusions (they were not), the raising of that objection by the Supreme Court for the first time in proceedings before that Court with the result that petitioner is denied an opportunity to amend the allegations and be heard on his constitutional claim is itself a denial of the rights guaranteed by the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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MOTION FILED

APR - 4 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1072

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC.,

Petitioner,

vs.

GEORGE E. MAHIN, SUCCESSOR DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ET AL.,

Respondent.

MOTION OF S. BLOOM, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND PROPOSED BRIEF

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1072

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC.,

Petitioner,

vs.

GEORGE E. MAHIN, SUCCESSOR DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ET AL.,

Respondent.

MOTION OF S. BLOOM, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, S. Bloom, Inc., an Illinois corporation, respectfully requests permission to file instanter the attached brief amicus curiae in support of the petition for certiorari filed by Glenn R. Heyman, Trustee in Bankruptcy of F. W. Koenecke & Sons, Inc. The following grounds are submitted in support of this motion:

1. This case involves a constitutional challenge to a portion of the Illinois Cigarette Tax Act by the Trustee in Bankruptcy of F. W. Koenecke & Sons, Inc., whose business was the wholesale distribution of cigarettes.

2. The same year that this case was filed, Applicant (also a cigarette distributor), as well as five other cigarette dis-

tributors, filed similar suits against the State of Illinois in the Circuit Court of Cook County, Illinois, raising constitutional issues identical to those raised in this case.

3. The State of Illinois recognized the identity of issues among the seven cases filed by the cigarette distributors and on November 4, 1968, filed a motion in this case to consolidate the seven cases on the ground that the other suits raised "identical issues" to those raised in the Koenecke case. This motion has not yet been ruled upon.

4. In the amended complaint in the case presently before the Court, Petitioner makes a two-pronged attack upon the unconstitutionality of the inverse discount system—Sec. 2 of the Illinois Cigarette Tax Act. It is alleged both that (a) the inverse discount system is unconstitutional *on its face* as a patently arbitrary and unreasonable classification of cigarette distributors, and (b) that the inverse-discount system is unconstitutional in its *operational effect* upon petitioner.

5. Although both of these arguments were vigorously urged before the trial court and the Illinois Supreme Court, petitioner's presentation to this Court does not adequately discuss the issue of the unconstitutionality of the statute on its face. Petitioner instead concentrates on the statute's operational effect, necessarily dwelling at length on facts peculiar to its situation. This approach obscures the simple constitutional issue involved.

6. The *first* inquiry by this Court must be whether there is any conceivable set of facts that would sustain the statute attacked; if there is none, the statute must be held unconstitutional on its face. This Court need not consider any of the factual allegations concerning the statute's operational effect, because the statute is demonstrably arbitrary and unreasonable in its failure to treat all cigarette distrib-

utors equally, even if all of the factual arguments raised by Respondent are conceded.

7. Petitioner's argument overemphasizes the statute's operational effect, neglecting the simple constitutional issue which is of paramount importance to Applicant and the other concerned cigarette distributors. A ruling that the statute is unconstitutional on its face would effectively put an end to the controversy concerning the statute and avoid the possibility of seven separate trials concerning the statute's operational effect.

8. Applicant has attempted to obtain the consent of the parties to file this brief, but consent has been refused by the respondent.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE INVERSE DISCOUNT SYSTEM IS UNCONSTITUTIONAL ON ITS FACE

Given the fact that the purpose of the discount is to compensate distributors for their tax collection costs, the apparent legislative premise behind *decreasing* the amount of discount as the distributor's yearly dollar total of tax stamp purchases *increases* is that distributors' per unit costs of collection decrease with increased volume. Thus, the legislature was conceivably attempting to equalize the economic burden of collecting the tax among distributors.

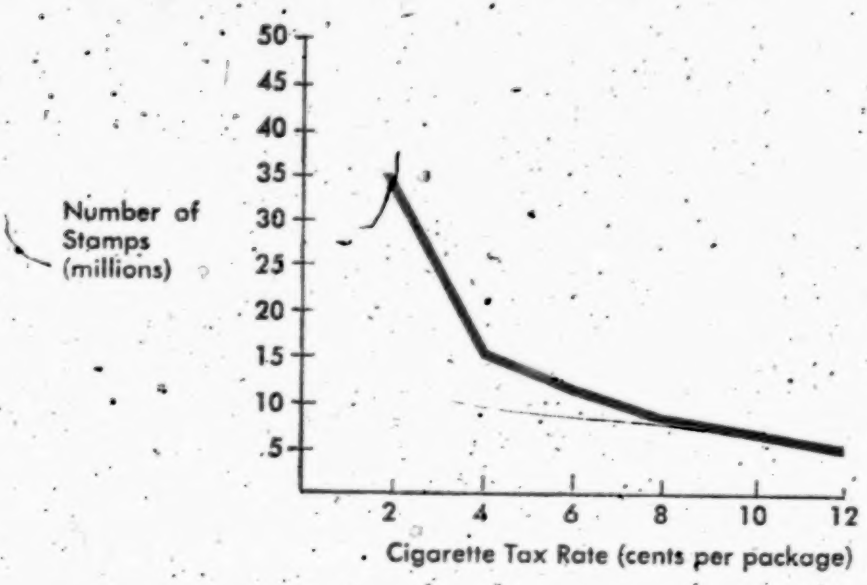
The Illinois Supreme Court sustained the inverse discount system on the ground that costs do, in common experience, decrease with increased volume; hence the legislative classification was reasonable. However, the argument that the inverse discount system is unconstitutional on its face *does not dispute this factual premise;* even if costs of collection do decrease with increased volume, the discount system is unconstitutional precisely because it does *not* classify distributors on a cost-volume basis.

The discount system classifies distributors, not by the volume of their stamping activity, but by the yearly dollar total of their tax stamp purchases. Since a tax stamp must be affixed to every package of cigarettes, it is true that a distributor's volume can be measured by the *number* of stamps it purchases. However, the classification here attacked is in terms of the *dollar total* of a distributor's stamp purchases, which is a function of two interrelated variables—price per tax stamp and number of stamps purchased.

An increase in the cigarette tax rate increases the price

per tax stamp, which in turn decreases the number of tax stamps equalling $700,000, (the incremental break points of the various discount brackets), as shown on the following table:

Relationship Between Cigarette Tax Rate and Number of Tax Stamps Equalling $700,000

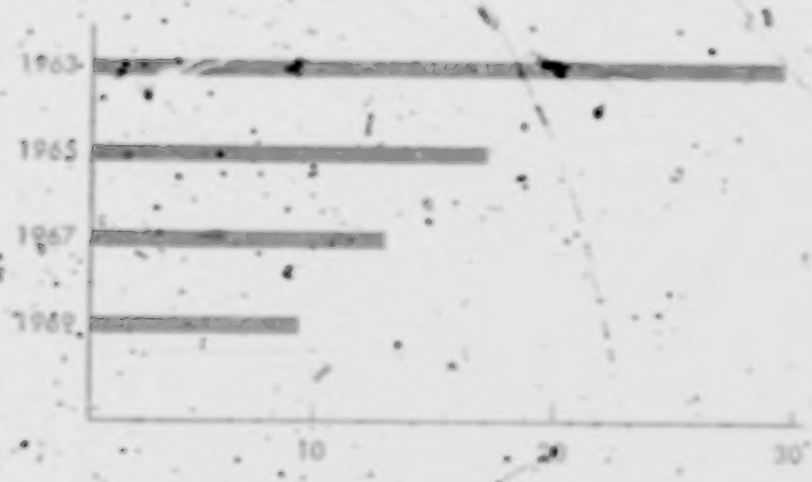


Thus, every time the cigarette tax rate is changed, the $700,000 classification brackets are automatically altered in terms of the volume of cigarettes stamped. As one goes up, the other necessarily goes down.

Since the inverse volume discount system was first inaugurated in 1963, the Illinois legislature on several occasions, *increased* the cigarette stamp tax rate (from 4¢ per pack in 1963 to 9¢ in 1969) and, simultaneously, *decreased* the distributor's discount percentages within the $700,000 brackets (in order to maintain the same rate of discount

compensation for each case of cigarettes stamped; but no change was made in the 5/32% discount. As a result, each increase in the tax rate has automatically decreased the volume of stamping required to raise a distributor into a lower discount bracket.

Number of Cases of Cigarettes (In Thousands) Equalling $700,000 of Stamps



Thus, in 1963 a distributor reached $700,000 of stamp purchases and moved to a lower discount bracket when he stamped 140,000 cases, as compared with 70,000 cases in 1951.

The way in which the Legislature has handled the changes in the tax and discount rates dramatically illustrates the

[illegible] to the Illinois Supreme Court's presumption that the [illegible] discount brackets reflect a rational cost-volume approach to the classification of distributors. Whatever is the true relationship between a distributor's volume of business and his per unit costs of collecting the cigarette tax, it is obvious that there is no rational connection between that relationship and the discount system at issue. In terms of volume, a distributor now passes to a lower discount bracket three times as fast as he did in 1952, not because his per unit stamping costs have decreased by two-thirds, but solely because of increases in the cigarette tax rate. . . .

The same type of irrational classification was struck down in the *Stewart Dry Goods* case. There, a graduated sales tax on retail merchants measured by gross receipts was held to violate the Equal Protection Clause because it created an arbitrary and unreasonable classification of merchants. The Court recognized that Kentucky, like Illinois in this case, had provided for a graduated tax on the apparent premise that greater receipts mean greater profit, with concomitant increased ability to pay. It was held, however, that gross receipts were not a rational measure of profitability of the enterprise, hence the tax created an irrational classification (294 U.S. at 558-59):

> "Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing rates of profit; and that gross and net profits vary with the character of the business as well as its volume."

The inverse discount system here in issue is even further removed from its intended purpose than was the tax in

Stewart Dry Goods, because the inverse discount is not even graduated on the basis of sales volume, let alone distributors' costs of handling the tax collection function for the State.

The *Stewart Dry Goods* decision is not the only example of classifications held unconstitutional because the criterion of classification was unrelated to the apparent legislative purpose. In *Air-Way Corp. v. Day*, 266 U.S. 71, 83 (1924), a state statute which measured a franchise tax on corporations by the number of no-par shares of that corporation's stock was held invalid:

> "The number of non-par value shares of the corporation is not an indication of, and does not purport to be a representation as to the amount of its capital. Each outstanding share represents merely an aliquot part of its assets. The number of shares not subscribed or issued has no relation to the privilege held by plaintiff in Ohio, and it is not a reasonable measure of such a fee."

Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459 (1937), held unconstitutional a statute forbidding stock insurance companies to act through agents who were their salaried employees, but permitting mutual insurance companies to act through such employees. It was held that, in determining the reasonableness of classification (301 U.S. at 462):

> "'[M]ere difference is not enough: the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."'

CONCLUSION

While there may indeed be differences among cigarette distributors in terms of their costs of stamping and collecting the cigarette tax, any correlation between these differences and the method of classification adopted by the Illinois legislature is wholly fortuitous, since the classification is made neither in terms of distributors' sales volume nor in terms of their tax collection costs. The inverse discount system, predicated solely on the dollar value of stamp purchases, is an arbitrary and unreasonable classification of distributors, in violation of the equal protection clause.

Respectfully submitted,

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